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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-618

HARRISON PROPERTY MANAGEMENT CO., INC., WALTER J. HARRISON, WILLIAM H. HARRISON and MRS. LYDIA HARRISON COUTURIE RYAN,

Petitioners

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Harrison Property Management Co., Inc., Walter J. Harrison, William H. Harrison and Mrs. Lydia Harrison Couturie Ryan, respectfully petition this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the United States Court of Claims rendered in this cause on March 16, 1973 and in which Motion for New Trial and Rehearing was denied by Order issued July 13, 1973.

I. OPINIONS BELOW

The opinion of the United States Court of Claims is reported at 475 F.2d. 623 (1973), reproduced as Appendix B.

The opinion of the Trial Commissioner was filed February 8, 1972 and is reproduced in Appendix A.

II. JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Claims, decided on March 18, 1973. (Appendix B). A timely Motion for New Trial and Rehearing was denied on July 13, 1973. (Appendix B). The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is Section 1255 of Title 28 of the United States Code.

III. QUESTION PRESENTED

On April 14, 1960, Walter J. Harrison, William H. Harrison, and Lydia Harrison Couturie Ryan, organized Harrison Property Management Co., Inc., each contributing $5,000 in exchange for the corporation's capital stock; the "purpose" article of the Corporate Charter (a matter of public record) stated that the corporation was being organized to manage property belonging to others. (Exhibit 1). Simultaneously with the formation of the corporation, the same three individuals, on April 14, 1960, entered into a contract with the corporation under which the corporation agreed to manage properties owned by the individuals. (Exhibit 6). To facilitate the performance of the management contract, the three individuals, on the same day, (April 14, 1960), transferred the record title to the property to the corpora-

tion. (Exhibit 5). Thereafter, the corporation managed the property pursuant to and strictly in accordance with the terms of its agreement with the three individuals. The question presented is:

> Can a corporation act as agent for its shareholders pursuant to a management agreement without being subject to federal income tax on funds received by the corporation for the benefit of its principals-shareholders?

IV. STATUTES INVOLVED

Title 26, Section 11(a) of the United States Code provides:

> A tax is hereby imposed for each taxable year on the taxable income of every corporation. The tax shall consist of a normal tax computed under subsection (b) and a surtax computed under subsection (c).

Louisiana Civil Code Articles 2985 and 2991 are as follows:

> Article 2985 - A mandate, procuration or letter of attorney is an act by which one person gives power to another to transact for him and in his name, one or several affairs.
>
> Article 2991 - The procuration is gratuitous unless there has been a contrary agreement.

V. STATEMENT OF CASE

Harrison Property Management Co., Inc., was organized on April 14, 1960, by Walter J. Harrison, William H. Harrison, and Mrs. Lydia Harrison Couturie Ryan. The purpose of the corporation as stated in its Charter was to administer and manage the property, real, personal and mixed, of any person or persons, firm or firms, corporation or corporations, whether under a power of attorney, or otherwise, and, in connection therewith, to hold title to some, or all, of said property (for administration and management purposes only); to negotiate leases relative thereto; to grant rights-of-way thereon or thereover; and to otherwise arrange for the use and development of such property. On the same day the aforementioned three individuals and the corporation entered into a written agreement for the management of property belonging to the three individuals in indivision, and the three individuals transferred record title to certain property to the corporation.

Although the transfer of the said property to Harrison Property Management Co., Inc., was in the form of an absolute transfer, it was "without any warranty whatever", no consideration was recited in the Act of Transfer (Exhibit 5); and, it was specifically provided in the contemporaneously executed agreement (Exhibit 6) that the said transfer was solely and only as a matter of convenience and accomodation and without any consideration having been paid for the property so that the Harrison Property Management Co., Inc., might manage the property, with the understanding and agreement that all revenues and proceeds derived from the administration and management of the property should be credited to the three individual

owners, who obligated themselves to pay all costs and expenses incurred in connection with the administration and management. The procuration was gratuitous, pursuant to Articles 2985 and 2991 of the Louisiana Civil Code. Moreover, the authorization to administer and manage was subject to cancellation by Walter J. Harrison, William H. Harrison and Mrs. Lydia Harrison Couturie Ryan, on demand, and the corporation was obligated, at all times, to retransfer all of the said property to the true owners thereof, without receiving any consideration whatever therefor. Furthermore, if the true owners of the property did not exercise the right to terminate the arrangement at an earlier date, the contemporaneous management agreement provided that it was to automatically terminate at the end of fifty years from its date, at which time the said property was to be retransferred to the owners, again without consideration.

The Harrison Property Management Co., Inc., acted at all times from and after April 14, 1960, in strict accordance with the provisions of the transfer and the contemporaneous management agreement. All of its books and records were kept in a manner that was consistent with the transfer and contemporaneous agreement; funds derived from the property were disbursed in accordance therewith; tax returns were filed by the corporation that were consistent with the agreement of the parties; and the individual taxpayers accounted for all funds received by and through the corporation and for all expenses incurred by the corporation on their behalf in managing and administering the property and discharged their proper tax liability therefor. (Findings of Fact Nos. 10, 12, 14, 15, 16, 17, 18, 19, 24,

pages 59, 60, 62).

The Trial Commissioner of the United States Court of Claims ruled that the funds which Harrison Property Management Co., Inc., received as agent for its principals, who are shareholders of the corporation, is not taxable income to the corporation, stating:

> In summary, the rule of law applicable to the facts of the instant case is that where individuals create a wholly owned corporation, receiving its entire issued stock in exchange for cash, transfer without consideration legal title to real property to the corporation while expressly retaining beneficial title to the property in themselves, and by contemporaneous agreement designate the corporation in terms of limitation as their agent to collect income from the property and credit the net proceeds (after expenses) directly to the individuals on the books of the corporation rather than distributing them as dividends, the proceeds so credited and paid are received by the individuals not in their role as shareholders but as principals, beneficial owners, and/or cestuis que trustent resulting from a principal-agent or trustee-beneficiary relationship, and as such are properly taxable to the individuals rather than to the corporation, particularly where the corporation confines its activities to the limitations of its agency-fiduciary prescription rather than engaging in business beyond that capacity, and the purpose of creating the corporation is solely

> to avoid title transfer difficulties on the death of one or more of the property transferors, without any detectable motivation relating to tax avoidance or evasion, of securing the shelter of personal immunity."pp.22,23.

The Trial Commissioner's Findings of Fact, except for portions of 3, 7 and 10, were adopted by the Court. However, the United States Court of Claims held that the corporation is taxable on the funds it received as agent for its principals-shareholders. A Motion for New Trial and Rehearing was denied.

The jurisdiction of the United States Court of Claims is Title 28, Section 1346 (a) (1) of the United States Code.

VI. REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Claims is in conflict with the pronouncements of this Court in the case of National Carbide Corporation v. Commissioner, 336 U.S. 422 (1949), wherein the Court pointed out, at page 437:

> "What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor."

Although the Court of Claims acknowledged that the arrangement between the corporation and the individuals was not tainted with any tax saving motivation and that the corporation complied in all respects with the terms of the management agreement, nevertheless, the Court of Claims disqualified the corporation as agent because

it is owned by its principals. This holding is contrary to the clear statement of the tax law set out in the National Carbide case quoted above.

In arriving at its conclusion, the United States Court of Claims incorrectly applied tests for determining the validity of the agency relationship. First, the Court quoted from the National Carbide case:

> "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal..." (475 F.2d. at p. 627).

The Court continues its opinion:

> "...the opinion [National Carbide case] illustrated that premise by saying of the corporate parent in that case (Airco, the alleged 'principal'):
>
> > 'The entire earnings of petitioners [Airco's subsidiaries, the alleged "agents"], except for trifling amounts, are turned over to Airco not because the latter could command this income if petitioners were owned by third persons, but because it owns, and thus completely dominates the subsidiaries. Airco, for sufficient reasons of its own, wished to avoid the burdens of principalship. ...'"

However, the portion of the opinion in the National Carbide case which the Court of Claims omitted from its opinion is as follows:

> "...if such is the case. Its business purpose must be the carrying on of the normal duties of an agent. Absence of the factors mentioned above, and the essentiality of ownership of the corporation to the existence of any 'agency' relationship in the Moline Properties, Commonwealth Improv. Co., and Southern Pacific Cases indicate the fallacy of the agency argument made in those cases.
>
> The same fallacy is apparent in the contention that petitioners are agents of Airco. They claim that they should be taxable on net income aggregating only $1,350,despite the fact that during the tax year (1938) they owned assets worth nearly 20 million dollars, had net sales of approximately 22 million dollars, and earned nearly four and one-half million dollars net. Their employees number in the thousands. We have passed the question whether Airco's interest in these assets is that of owner of the subsidiaries or lender, but whatever the answer, they do not belong to Airco as principal." p.437

The facts set out in the above quoted portion of the opinion clearly demonstrate that the subsidiaries were <u>not</u> true agents <u>because</u> they were <u>not</u> carrying on the <u>normal duties of an agent</u>, whereas Harrison Property Management Co., Inc., was organized to manage property of "any person or persons,...whether under power of attorney or otherwise, and in connection therewith to hold title to some or all of said property (for administration and management purposes only)." (Article II, Corporate Charter, Exhibit 1).

Moreover, the relations of the corpora-

tion as agent with its principals-owners were not dependent on the fact that the corporation was owned by the principals. On the contrary, the relations between the corporate agent and its principals insofar as the management of the property was concerned are dependent solely upon the terms of the agency agreement and not on the ownership of the agent by its principals.

Secondly, despite the rule that a true corporate agent may handle property of its owner-principal without being taxable on the principal's income, the United States Court of Claims explained its decision in the case of Carver v. United States, 188 Ct. Cls. 202, 412 F.2d. 233 (1969) on the basis of a non-owner-principal being associated with an owner-principal and thus justified the recognition of an agency relationship with respect to a transaction in which income from the sale of property (title to which was in the name of the corporate agent) was held not taxable to the corporation. It is submitted that the presence of a non-owner-principal is not required by the rule enunciated in the National Carbide case; and since all other factors that were found in Carver, supra, are present in this case, the doctrine of National Carbide should prevail herein.

Thirdly,neither the validity of the agreement nor the performance of the parties thereunder is in dispute. "The corporation handled the property transferred to it in accordance with the Articles of Incorporation and the agreement..." (Findings of Fact No. 10, p. 59). The limitations on the agent's authority with respect to the property are consistent with limitations principals impose on agents, regardless of ownership relationships between them, and

such limitations do not support the conclusion of the Court of Claims that "all of the corporation's relations with the beneficial owners of the managed property were wholly dependent on the fact that they were the sole shareholders". (475 F.2d. at 628).

Moreover, the Trial Commissioner found as a fact that such was not the case:

> "The right of Walter, William, and Lydia to receive the revenues and proceeds from the property or their obligation to pay the said expenses was not, in any way, dependent upon their being or remaining shareholders of Harrison Property Management Co., Inc., but such right to receive said revenues and proceeds and the obligation to pay said expenses were predicated solely upon the agreement." (Findings of Fact No. 7, p.32).

Fourthly, the agreement in question is not an anticipatory assignment of income, but rather it is a reservation of the income to be produced by the property to which the corporation was to hold title solely for management purposes.

Fifthly, the United States Court of Claims erroneously relies on Moline Properties, Inc., v. Commissioner, 319 U.S. 436 (1943) for its conclusion that the activity carried on by Harrison Property Management Co., Inc. "was enough for taxability under the Moline Properties principle". (475 F2d. at 629). This Court pointed out in the National Carbide case that the agency argument had failed in the Moline case because of the absence of factors essential to the establishment of an agency agreement, not because the activities were "enough for

taxability."

The Trial Commissioner of the United States Court of Claims correctly stated the principles applicable in this case as follows:

> "Strict application of the corporate entity concept necessarily permits the corporation's owners to commission it as their agent just as they might engage the agency services of a completely unrelated individual or corporate entity. With this difference: that the closer the relationship between principal and agent the greater the scrutiny given the bona fides of the arrangement in order to prevent abuses and overreaching. It is as wrong to penalize a principal by having him forego the advantages of a corporate agency (including the taxability of income to the principal) merely because of a close but otherwise innocent relationship as it is to permit such arrangements to further ulterior purposes." (p. 22)

In this case, the trier of fact found a bona fide agency relationship between the corporation and its owners, and therefore, the United States Court of Claims erred in not applying the rule announced by this Court in the National Carbide case that a true corporate agent is not foreclosed "from handling the property and income of its owner-principal without being taxable therefor." (336 U.S. at 437).

CONCLUSION

WHEREFORE, petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Claims.

(ORIGINAL SIGNED)
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APPENDIX A

In the United States Court of Claims

No. 280-69

(Filed FEB 8 '72)

HARRISON PROPERTY MANAGEMENT, CO., INC.; WALTER J. HARRISON, WILLIAM H. HARRISON AND MRS. LYDIA HARRISON COUTOURIE RYAN v. THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*

C. Ellis Henican, attorney of record, for plaintiffs. *Henican, James & Cleveland*, of counsel.

Michele B. Metrinko, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Philip R. Miller* and *Joseph Kovner*, of counsel.

OPINION

BERNHARDT, *Commissioner:* The central issue turns on whether profits in the tax years 1960–63 derived principally from oil leases to property, the record title to which is in the name of a management corporation, are properly taxable to the corporation, as the defendant maintains or, as the plaintiffs contend, they are taxable solely to the individuals who, while retaining beneficial ownership of the property, transferred the nominal title thereof without consideration to the corporation of which they were the sole incorporators, stockholders, officers, and directors. A subordinate issue is whether

*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 134(h).

minor amounts paid by such corporation to two of its three shareholders as wages are properly classified as wages and are taxable accordingly under the Federal Insurance Contribution Act. The plaintiffs prevail on the first issue, and the defendant on the second.

Walter J. Harrison, William H. Harrison, and Mrs. Lydia Harrison Couturie Ryan, brothers and sister, owned extensive oil-bearing acreage and a headquarters building in Louisiana which, prior to April 14, 1960, they had operated through Crescent Commercial Company, their family partnership. On April 14, 1960, the three individuals formed the plaintiff corporation, Harrison Property Management Co., Inc., to which they transferred nominal title to the property in question, without warranty or consideration, reserving to themselves beneficial title to the property and all rights to proceeds of existing leases thereon for mineral rights and rights-of-way. The corporation replaced the partnership, and was formed solely for the stated purpose of providing for efficient management in the event of the death of one of the individuals. There is no hint that tax evasion or avoidance motivated the transaction.

The corporate charter tightly limited the rights, power, and authority of the corporation to conduct its business with particular reference to such transactions as acquisition of real property, investment of funds, fixing of officers' salaries, employment of personnel, adoption or repeal of by-laws, borrowing or lending of money, and sale or encumbrance of property, all of which transactions required unanimous approval of the shareholder directors. The transferors, who were the incorporators and became the sole stockholders of the corporation in equal proportions, as well as its sole officers and directors, retained full control of corporate decisions as to the matters specified. The charter required approval of a majority of the directors for the granting of leases, rights-of-way, licenses, or permits regarding the property transferred to the corporation "for administration and management purposes", and prohibited transfers of such rights so as to favor one officer or shareholder over another, directly or indirectly.

Contemporaneously with the incorporation the individuals and the corporation entered into an agreement which speci-

fied that the transfer of property to the corporation was made "solely and only as a matter of convenience and accommodation and without consideration whatsoever" having been paid by the corporation to the individuals, who were expressly identified as the "beneficial owners" and "true owners" of the property transferred, with the corporation disclaiming "any right, title, or interest" in and to the property other than the right to manage and administer it. By the agreement the corporation's expenses were to be charged against the three individuals in equal amounts by means of deductions from proceeds of operations distributable periodically to the individuals. The agreement also provided for the retransfer without consideration of any part of the corporate property to the individuals on a proportionate basis, required the corporation in the event of its breach of the agreement to retransfer all of the property proportionately to the individuals without consideration on due notice and demand by them, and required the retransfer of the property to the individuals after 50 years.

Throughout the taxable years in issue the corporation complied in all respects with the agreement's terms. It deducted from corporate revenues all expenses and credited the balance in proportionate amounts to accounts of the individuals, who received such earnings directly by virtue of the agreement rather than as dividends to shareholders. The individuals were obligated to replenish the corporation's funds for costs and expenses, as needed, again on a proportionate basis. Besides payments for leases (the major source of income), receipts included cash contributions from shareholders, building demolition proceeds, profits from land sales, camp rentals, and pecan sale proceeds. Disbursements included salaries, payments to shareholders (not as dividends), taxes, cost of litigation and professional services, supplies, travel expenses, utilities, maintenance costs, commissions, insurance premiums, land care expense, contributions, and petty cash. The corporation maintained a checking account and recorded all receipts and disbursements on its books and records. No loans were made by or to the corporation.

The members of the first meeting of the board of directors of the corporation dated April 15, 1960, specified that it was

to be regarded purely as a "management instrument only" without change from the Crescent Commercial Company partnership which it succeeded, and stated the purpose of forming the corporation to be "solely to provide for efficient management in the event of the death of one of the Harrisons."

Each of the incorporators contributed $5,000 to the authorized capital of $15,000, and received in exchange 50 of the 150 authorized and issued shares of capital stock. Thus the real property transferred to the corporation did not represent capital contributions, but rather a transfer without consideration.[1] The corporation and the individuals joined in suits. Some leases were signed by the corporation alone and some by it and the individuals. The corporate accounts reflected the three individuals as joint owners of the properties whose nominal title had vested in the corporation. It maintained capital accounts in the names of the three individuals and generally speaking kept its financial and accounting records in much the same way as Crescent Commercial Company, the family partnership which it succeeded.

For calendar year 1960 the corporation filed a United States Fiduciary Income Tax Return on Form 1041, showing a distribution of net income proportionately to the three individuals. In 1961, 1962 and 1963 the corporation filed returns on Form 1120, reporting no income or expenses but accompanying each return with a schedule showing the proportionate distribution of income and expenses to the three individuals. In each of the calendar years 1960 through 1963 each of the individual plaintiffs filed a separate Federal tax return reporting the income and expenses allocated to them by the corporation. The taxes were paid accordingly. On February 9, 1968, IRS made timely assessments of taxes and interest against the corporation as shown in finding 20, *infra*.

[1] Transfer of non-marketable legal title to property to the corporation while the equitable or beneficial title remained in the transferors contributed nothing beyond token value to the corporation's capital, and served only to effectuate and confirm the corporation's agency mission. Even if the legal title had value to the corporation, it would be effectively neutralized by the stockholder-beneficial owners' complete power over the corporation's disposition of its assets.

The assessments against the corporation were paid by the three individual plaintiffs on a proportionate basis. Claims for refund were duly filed by the corporation, and disallowed on March 28, 1969, resulting in this suit.

Decisions in this controversial area are as diverse as they are legion. The beacon cases are *Moline Properties, Inc.* v. *Commissioner*, 319 U.S. 436 (1943), and *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422 (1949). The Court of Claims reviewed the tangled tug-of-law in *Carver* v. *United States*, 188 Ct. Cl. 202, 412 F. 2d 233 (1969), where it applied the holding in *Moline* that when it carries on business activity serving its owners' convenience a corporation is a separate taxable entity, and in *Love* v. *United States*, 119 Ct. Cl. 384, 96 F. Supp. 919 (1951) that the corporation's separate identity for tax purposes must be recognized where there has been either much or little use of its advantages in effectuating business activities, and the exception by dicta in *National Carbide Corp.*, *supra*, at p. 437:

> What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor. Whether the corporation operates in the name and for the account of the principal, binds the principal by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. * * *

The case under consideration falls within this exception because:

1. By the provisions of the corporate charter, the contemporaneous side agreement, and the resolution adopted by the first meeting of the board of directors, the parties clearly expressed their intention to use the corporation as their agent with well-pruned, largely ministerial, powers and duties making it a mere revenue conduit.

2. Possession by the corporation of legal title to the property, with beneficial title retained by the transferors, was con-

sistent with their agency purpose, and gave the corporation nothing of marketable capital value without concurrence of the beneficial owners.

3. The situation and actions of the Harrisons vis-a-vis the corporation both in creating it and conducting its affairs were consistent with their announced purpose in establishing the corporation as an agent, that is, to forestall problems should one or more of the transferors die. The purposes of such an arrangement are succinctly stated in *Tomlinson* v. *Miles*, 316 F. 2d 710, 713 (5th Cir. 1963), *cert. denied* 375 U.S. 828 (1963):

> * * * The benefits of such an arrangement are obvious. In the first place, no dower rights would attach to the wives of the three married parties to the transaction. In the second place, in the event of the death of any member of the group no administration would be necessary in order to clear the title to the real estate. In the third place, sales could be made by an execution of an instrument signed by officers of the corporation rather than requiring seven signatures initially, or six signatures after Spiner got out. Also, any other documents necessary in completing transactions dealing with the sale of property, such as the releasing of mortgages on the property, the cancellation of security instruments when full payment was completed, the execution of contracts for sale all would be facilitated. Finally, by the maintenance of a corporate bank account in which all funds were initially deposited, current payments of taxes, fees and the like could be made and all the excess could be immediately paid out to the individuals.

4. There is no evidence of tax manipulation motivating or resulting from the transaction.

5. In compliance with the requirements of the contemporaneous agreement the parties at all times provided the corporation's operating capital out of their own pockets, and net profits of the corporation, after deduction of expenses, were credited directly to the accounts of the individuals rather than to the corporation, just as had been the case in the preceding partnership which it was the parties' intention to emulate functionally. The first tax return filed by the corporation was a fiduciary return, consistent with the announced and actual intent of the transaction, while succeeding returns reported no income.

6. The only business conducted by the corporation was that directly concerned with its agency role.

The *Carver*, *Moline*, *National Carbide* and *Love* cases cited above are distinguishable from the instant case. In *Carver* the court concluded that the corporation acted as agent in one transaction, and as to that transaction recognized the agency relationship and the corporation's consequent exemption from income taxation despite the fact that the principal was the owner of the corporate agent. In *National Carbide* the Supreme Court recognized the possibility of a true agency in the passage quoted *supra*, and our facts constitute such an agency exception. In *Moline* there was no contract of agency or even the usual incidents of an agency relationship. In *Love* there was no agency agreement and the court found "considerable activity for a phantom corporation", and a purpose to avoid the risk of personal liability through the medium of a corporation device. "Having chosen to operate in this fashion, having enjoyed the advantages of incorporation, and having actually conducted business in the name of the corporation, plaintiffs cannot avoid the tax consequences of their choice." *Id.* at 404–5. And in *Tomlinson* v. *Miles*, *supra*, relied on by the defendant here, and by the court in the *Carver* case, *supra*, again there was no agency agreement between the corporation and the shareholders.

In analyzing the *Moline* and *National Carbide* decisions with particular reference to the effect of an express agency agreement, BITTKER AND EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS (3rd ed. 1971), states at ¶ 2.10, p. 2 – 24:

> Although these Supreme Court decisions are frequently quoted in support of the theory that "business activity" is inconsistent with an agency relationship between the corporation and its shareholders, they do not fully support this theory. A better explanation of these cases is that the corporation must establish that it is an agent for its shareholders (with respect to the transactions in question) by evidence other than the control which shareholders automatically possess over their corporations. If the corporation merely holds title to property, and the management functions are carried on by the shareholders, it is comparatively easy to infer that the corporation is acting only as an agent or nominee. But if the corporation not only holds title but also manages the

> property or business operations, there is less reason to draw this inference; and if the shareholders disclaim responsibility for the corporation's activities, they are ipso facto rejecting the status of principals. * * *

The case law is canvassed in MERTENS, LAW OF FEDERAL INCOME TAXATION (Vol. 7, 1971), §§ 38.01–38.15, stating as to the "business activity" aspect, the general rule at § 38.12, pp. 29–31:

> It seems fair to restate the rule of the cases as follows: A wholly owned corporation, formed for a purpose other than tax avoidance, will be disregarded only where it actually performs no function beyond the holding of legal title to the property transferred to it and all of the incidents and liabilities of ownership of the property have fallen directly to the beneficial owners of the property. Where the corporation performed the functions for which it was created, and these functions are sufficient to constitute a business activity for purposes of taxation, the corporation will not be disregarded. * * *

However,

> * * * the mere collection and transmittal of the rents, with such incidental activities as negotiating with tenants and keeping the property in repair, do not justify dignifying the corporation's operations as engaging in business, any more than would have been the case if an unrelated corporate fiduciary had done the same. * * *

And § 38.15 at pp. 38–39:

> In conclusion it may be stated that the doctrine of corporate entity is one of substance and vitality and that the disregard of the doctrine is the exception instead of the rule. The Court of Claims has stated that the exception to the general rule is limited to sham transactions and situations involving transactions or matters that lack a business purpose and are a mere formality. * * * [Citing *Ingle Coal Corp.* v. *United States*, 131 Ct. Cl. 121, 127 F. Supp. 573, *cert. denied* 350 U.S. 842 (1955); *Town of Fairhaven, Mass.* v. *United States*, 135 Ct. Cl. 782, 142 F. Supp. 590 (1956).]

Thus, whether approached from the agency or the business activity point of view, both *Bittker and Eustice*, and *Mertens*, harmonize on the result.

Kurtz and Kopp, in their monograph *Taxability of Straw Corporations in Real Estate Transaction*, 22 TAX LAWYER

647 (1969), survey the precedential disarray on the subject and in reconciliation urge that the decision as to whether or not to disregard the corporation entity should be based on the beneficial ownership of the property producing the taxable income, rather than upon such indeterminate grounds as the existence of an agency relationship, or whether the corporation was engaged in business activity, or whether the convenience dictating the formation of the corporation should not preclude its creators from disavowing its separate identity.

Strict application of the corporate entity concept necessarily permits the corporation's owners to commission it as their agent just as they might engage the agency services of a completely unrelated individual or corporate entity. With this difference: that the closer the relationship between principal and agent the greater the scrutiny given the bona fides of the arrangement in order to prevent abuses and overreaching. It is as wrong to penalize a principal by having him forego the advantages of a corporate agency (including the taxability of income to the principal) merely because of a close but otherwise innocent relationship as it is to permit such arrangements to further ulterior purposes.

In summary, the rule of law applicable to the facts of the instant case is that where individuals create a wholly owned corporation, receiving its entire issued stock in exchange for cash, transfer without consideration legal title to real property to the corporation while expressly retaining beneficial title to the property in themselves, and by contemporaneous agreement designate the corporation in terms of limitation as their agent to collect income from the property and credit the net proceeds (after expenses) directly to the individuals on the books of the corporation rather than distributing them as dividends, the proceeds so credited and paid are received by the individuals not in their role as shareholders but as principals, beneficial owners, and/or *cestuis que trustent* resulting from a principal-agent or trustee-beneficiary relationship, and as such are properly taxable to the individuals rather than to the corporation, particularly where the corporation confines its activities to the limitations of its agency-fiduciary prescription rather than engaging in busi-

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ness beyond that capacity, and the purpose of creating the corporation is solely to avoid title transfer difficulties on the death of one or more of the property transferors, without any detectable motivation relating to tax avoidance or evasion, of securing the shelter of personal immunity.

The remaining issue relates to the assessment against the corporation in 1968 of $647.33 in Federal Insurance Compensation Act taxes, penalties and interest for salaries of $3,200 each paid in 1960 by the corporation to Walter J. and William H. Harrison for services rendered by them to the corporation in that year while they were corporate officers, directors, and shareholders. The assessment was paid in equal shares by the three Harrisons. The plaintiff contends that, rather than being remuneration paid by the corporation to Walter J. and William H. Harrison for services rendered, and thus subject to FICA taxes, the sums paid were in reality extra distributions to them as partners. If so, the plaintiffs concede that the sums would be subject to the self-employment tax under section 1402 of the Internal Revenue Code, but it is not clear that such self-employment taxes were ever paid by the recipients. Since Article XV of the corporation charter authorizes the payment of ceiling salaries to the two individuals as corporate officers, which salaries were subsequently waived by formal authorization of the board of directors, and the account books of the corporation reflect that the sums received by the two individuals were paid them as salaries, it is presumed that the sums paid were salaries to corporate officers rather than distributions to partners, and the corporation was liable to pay FICA taxes thereon. *United States* v. *Griswold*, 124 F. 2d 599 (1st Cir. 1941), cited by plaintiff is not controlling. There it was simply held that trustees in an investment trust who were not subject to shareholder control are not employees whose compensation was subject to the payment of Social Security taxes. The individuals in the case under consideration rendered services to the corporation for which the corporation was authorized to pay—and did pay—salaries. Thus, the assessment of FICA taxes, along with penalties and interest, was proper.

The plaintiff corporation is entitled to judgment on the agency issue, but not on the FICA tax issue.

Findings of Fact

1. On or about April 14, 1960, and for some time prior thereto, Walter J. Harrison, William H. Harrison and Mrs. Lydia Harrison Couturie Ryan (hereafter Walter, William, and Lydia, for convenience) were the owners of approximately 22,000 acres of land (sometimes hereinafter referred to as "Harrison lands"), in the Parish of Lafourche, State of Louisiana.

2. The Harrison lands were adaptable to the trapping of fur-bearing animals and the production of oil and gas. They were not useful for any other purpose.

3. (a) On April 14, 1960, Walter, William, and Lydia transferred the Harrison lands, a building at 507 Decatur Street in the city of New Orleans that was used by the transferors as their office and for the handling of fur-bearing animals which were at one time caught on the Harrison lands, and the furniture, furnishings and equipment that were used in the operation of said office (all of said property is hereafter sometimes referred to as "the property"), to Harrison Property Management Co., Inc., by a notarial deed, without any consideration whatever having passed from the transferee to the transferor on account of said transfer. The deed granted title in fee without a warranty, but with full subrogation in and to all rights of warranty held by preceding owners and vendors. The only reservations in the deed were prior recorded rights-of-way, lease grants and servitudes, and any right, title and interest of the vendors to all existing oil, gas and mineral leases and to all rents and royalties thereunder.

(b) Immediately following the above transfer, the transaction was recorded in the journal of Harrison Property Management Co., Inc. by debiting the various asset items involved in the transfer and crediting the total aggregate value on a proportionate basis, to Walter, William, and Lydia.

4. At all times mentioned in the petition, Harrison Property Management Co., Inc. (taxpayer), was a Louisiana corporation, incorporated on April 14, 1960, following dissolution of a partnership of its stockholders, and was domiciled in the city of New Orleans. The Articles of Incorporation contained the following pertinent provisions:

ARTICLE II

The objects and purposes for which this corporation is organized are declared to be as follows:

To administer and otherwise manage the property, real, personal and mixed, of any person or persons, firm or firms, corporation or corporations, whether under a power of attorney or otherwise, and in connection therewith to hold title to some or all of said property (for administration and management purposes only); to negotiate leases relative thereto; to grant rights of way thereon or thereover; and to otherwise arrange for the use and development of such property.

To manage, supervise and administer the operation of any business or undertaking on any property subject to administration by the corporation when authorized by all of the members of the Board of Directors of this corporation.

ARTICLE III

The duration of this corporation shall be for a term of fifty (50) years.

* * * * *

ARTICLE XV

Unless authorized by the unanimous vote of all three of the members of the Board of Directors of this corporation given at a meeting of said Board of Directors duly called for such specific purposes, after notice of such meeting has been given to each director by United States registered mail at least ten (10) days prior to said meeting, the said notices to be sent to the directors at the addresses of said directors as shown in the official records of the corporation, this corporation shall have no right, power or authority whatsoever to:

1. Exercise any of the rights granted, authorized and/or permitted by R. S. 12:23, 12:24, 12:46, 12:48, 12:54 and 12:63; [Louisiana Code provisions]
2. Acquire, by purchase or otherwise, any property of any nature or kind whatsoever, other than office furniture and fixtures, marine supplies and automotive equipment, and the like, which may be required for the proper conduct of the corporation's affairs;

3. Invest any funds of the corporation in any property of any nature or kind whatsoever, whether tangible or intangible, or real, personal or mixed, other than as hereinabove authorized in the immediately preceding paragraph 2 of this Article;
4. Increase the salary or compensation to be paid to the president of this corporation over and above the sum of four hundred ($400.00) dollars per month or increase the salary or compensation to be paid to the secretary-treasurer of this corporation over and above the sum of four hundred ($400.00) dollars per month;
5. Engage in the employ of this corporation any person or persons other than the officers of this corporation and such other personnel or clerical employees as may be necessary for the proper conduct of the corporation and its affairs;
6. Make or adopt by-laws or repeal or amend any such by-laws so made and adopted in the manner herein provided;
7. Borrow or lend money; or,
8. Except as provided in ARTICLE XVI hereof, sell, transfer, dispose of, pledge, mortgage or otherwise alienate, transfer or encumber any property of any nature or kind whatsoever, title to which stands in the name of this corporation, or any right, title or interest therein or thereto.

ARTICLE XVI

When authorized by a majority of all of the directors of this corporation, this corporation may grant leases, licenses, permits or rights for mineral or trapping purposes, or otherwise, in or to, and/or grant rights of way on or over any property, title to which has been placed in this corporation for administration and management purposes, provided, however, that no such lease, license, permit or right, and/or right of way shall be granted by this corporation to or in favor of any officer, shareholder or director of this corporation, or to or in favor of any relative thereof by blood or affinity, or to or in favor of any firm or corporation in which any such officer, shareholder or director, or in which any relative or relatives of them, or of any of them, whether by blood or affinity, is or are interested, either directly or indirectly; or to or in favor of any person having any interest of any nature or kind whatsoever in the land which is the subject of such lease, license, permit or right, or right of way, and

title to which said land has been placed in this corporation for management purposes only, or to or in favor of any person having any interest in any agreement made with this corporation by the owners of any property, title to which has been placed in this corporation for management purposes, or to or in favor of any relative of any such person, whether by blood or affinity, or to or in favor of any firm or corporation in which they or any of them, or in which relatives of them or any of them, whether by blood or affinity, is or are interested, either directly or indirectly, unless, in any of such events, the giving and granting of such lease, license, permit or right, and/or right of way be authorized in writing by all three of the directors of this corporation.

* * * * *

5. Other features of Harrison Property Management Co., Inc. included:

(a) Its sole incorporators were Walter, William, and Lydia;

(b) Its authorized capital was fixed at $15,000 represented by 150 shares of the Par Value $100 Per Share Common Capital Stock, divided into 50 shares of Class A Stock which went to Walter, 50 shares of Class B Stock which went to William, and 50 shares of Class C Stock which went to Lydia. Each of the individuals paid $5,000 for his stock.

(c) The three classes of Common Shares had all of the same rights and privileges, except each class elected one member of the Board;

(d) There were certain pre-emptive rights, by classes, and there were certain restrictions on the sale or other disposition of the shares;

(e) William was President, Lydia was Vice President, and Walter was Secretary-Treasurer from the inception to the date of trial; and Walter and William conducted all of the corporate affairs as authorized by the board of directors.

6. On April 14, 1960, the taxpayer corporation entered into an agreement with the three transferors, the principal provisions of which read as follows:

1. Contemporaneously with the execution of this agreement Owners have, by act passed before C. Ellis Henican, Notary Public in and for the Parish of Orleans, State of Louisiana, dated of even date herewith, transferred to Management Corporation certain property, hereinafter sometimes referred to as "Property",

more fully described in said act, a certified copy of which, marked Exhibit A, is annexed hereto and made part hereof as though set forth at length herein. It is agreed by the parties hereto that such Property, so transferred by Owners to Management Corporation, shall be held, administered and disposed of by Management Corporation in the proper exercise of its corporate powers and subject to and on the terms and conditions hereinafter set forth, irrespective of any provisions or lack of provisions in the formal deed by which said Property was so transferred by Owners to Management Corporation:

(a) Transfer of the aforesaid Property by Owners to Management Corporation has been made solely and only as a matter of convenience and accommodation and without any consideration whatsoever having been paid therefor by Management Corporation to Owners and Management Corporation does herein and hereby acknowledge that it has not, in truth and in fact, any right, title or interest in and to said Property other than the right to manage and administer said Property pursuant hereto and that the record title to said Property has been transferred to Management Corporation solely and only to enable Management Corporation to so administer and manage said Property as hereinafter provided, the said Owners and the executors, administrators, heirs, legatees and assigns of said Owners, hereinafter sometimes referred to as "Beneficial Owners", being and remaining the true owners of said Property.

(b) As long as title to the aforesaid Property stands in the name of Management Corporation, said Management Corporation shall have and enjoy the right to operate, administer and manage said Property in the proper exercise of its corporate powers, as set forth and delineated in its Articles of Incorporation, including (i) the making of leases, whether for oil, gas or other minerals or for the trapping of fur bearing animals, or otherwise; (ii) the selling of shells, gravel and other similar deposits that may be found on said Property; (iii) the selling of such timber as may be located thereon; and (iv) the granting of rights of way on, over and through such Property.

(c) During the administration and management of the aforesaid Property by Management Corporation, all costs and expenses, hereinafter defined in paragraph (d) hereof, incurred or expended by Management Corporation in connection with the administration and management of said Property, shall be charged to and against the Owners and/or Beneficial Owners of the aforesaid

Property in the proportions of the true ownership of the aforesaid Property by each such Owner and/or Beneficial Owner.

(d) The costs and expenses that Management Corporation shall have the right to incur and expand hereunder for the account of the Owners and/or Beneficial Owners of the aforesaid Property and to deduct from the revenues and proceeds derived from the administration and management of the aforesaid Property, and to which such Owners and/or Beneficial Owners shall be entitled, all as herein provided, shall be and consist of all expenses of Management Corporation chargeable to or incurred for the benefit of all of such Owners and/or Beneficial Owners of the aforesaid Property in the administration and management thereof, including, but without limiting the generality of the foregoing, officers' salaries, office rent, telephone and telegraph charges, office light and heat, wages of office personnel, cost of patrolling the Property and of having lines marked, cost of the making of ground and other surveys and studies, cost of any new or used materials, supplies, furniture and fixtures, and automotive and marine equipment and the like reasonably needed and used by Management Corporation in carrying out its responsibilities hereunder, as well as all overhead and administrative expenses as are applicable to the managing and administering of the aforesaid Property, it being understood, however, that the amount of such costs and expenses to be charged against each such Owner and/or Beneficial Owner shall be proportionate to the interest of each such Owner and/or Beneficial Owner in and to the aforesaid Property.

(e) During the administration and management of the aforesaid Property by Management Corporation, and at least once each year from and after the date hereof, all revenues and proceeds derived from the administration and management of the aforesaid Property, pursuant to the provisions hereof, shall be credited to the account of each Owner and/or Beneficial Owner and shall be paid to each such Owner and/or Beneficial Owner after deducting therefrom all of the proper costs and expenses that are chargeable against each of them, all as hereinabove set forth in paragraph (d) hereof.

(f) If the management and administration of the whole or any part or portion of the aforesaid Property by Management Corporation should be discontinued at any time for any reason whatsoever then, and in any such event, any Owner and/or Beneficial Owner may de-

mand, in writing, that Management Corporation re-transfer said Property to such Owner and/or Beneficial Owner in the proportion of the then ownership of such Owner and/or Beneficial Owner in such Property, and Management Corporation binds and obligates itself to forthwith transfer such portion of said Property to said Owner and/or Beneficial Owner without consideration and by a proper and appropriate instrument of transfer similar to the form of that annexed hereto and marked Exhibit A.

Furthermore, if Owners and/or Beneficial Owners, representing in the aggregate the entire ownership of the aforesaid Property, should demand, in writing, that Management Corporation retransfer said Property to such Owners and/or Beneficial Owners, Management Corporation binds and obligates itself to forthwith transfer such Property to said Owners and/or Beneficial Owners without consideration and by a proper and appropriate instrument of transfer similar to the form of that annexed hereto and marked Exhibit A.

The obligations of Management Corporation to so transfer, as hereinabove provided, may be enforced in any legal manner available to the Owners and/or Beneficial Owners, including, but not limited to, a mandatory injunction or judgment for specific performance.

(g) It is agreed by and among the parties hereto that, in the event that Management Corporation should violate any of the terms, provisions or conditions herein contained or commit any default hereunder and such violation or default shall continue for more than thirty days after written notice of such violation or default has been given to Management Corporation by United States registered mail, any one or more of the Owners or any one or more of the Beneficial Owners may demand, in writing, that Management Corporation re-transfer all of the aforesaid Property to the then Owners and/or Beneficial Owners in the proportion of their then ownership in such Property and Management Corporation shall thereupon forthwith transfer such Property by a proper and appropriate instrument of transfer similar to the form of that annexed hereto and marked Exhibit A. The obligation of Management Corporation to so transfer such Property may be enforced in any legal manner, including, but not limited to, a mandatory injunction or judgment for specific performance.

(h) In the event that a re-transfer of the aforesaid Property has not been effected under the provisions of paragraphs (f) or (g) hereof within fifty years from

and after the date hereof, this agreement shall, upon the expiration of said fifty year period, ipso facto terminate and Management Corporation shall thereupon forthwith execute a proper and appropriate instrument of transfer re-transferring said Property to the Owners and/or Beneficial Owners in the manner hereinabove set forth in paragraph (g) hereof.

* * * * *

(j) As will appear from the act passed before C. Ellis Henican, Notary Public in and for the Parish of Orleans, State of Louisiana, dated of even date herewith and hereinabove referred to in paragraph 1 of this agreement, there has been excepted from the transfer contained in and by said act all right, title and interest of the Owners in and to all oil, gas and mineral leases presently covering and/or bearing against the Property described in and covered by said act of transfer, or any part or portions thereof, and all right, title and interest of the said Owners in and to the right to receive all rents and royalties due and/or to become due and payable under said leases, the said right, title and interest of said Owners in and to said leases and in and to the right to receive the rents and royalties thereunder having been by said act expressly reserved to said Owners. In order to effectuate and carry out such agreements the parties hereto herein and hereby agree and bind and obligate themselves, and each of them, to sign and execute all such division orders and/or other documents and agreements that may be necessary and appropriate from time to time to enable Owners and/or Beneficial Owners to receive directly and without passing through Management Corporation all rents, royalties and other proceeds of every nature or kind whatsoever presently due or to become due to Owners and/or Beneficial Owners, and each of them, under and in all such oil, gas and mineral leases presently covering and/or bearing against the aforesaid Property, it being the intent of the parties hereto that all rights of Owners and/or Beneficial Owners, and each of them, to receive such rents, royalties and other proceeds hereafter, in the same manner as such rights to receive said rents, royalties and other proceeds have existed in Owners heretofore, shall be and remain in full force and effect and shall be unaffected in any way whatsoever by the aforesaid transfer made by Owners to Management Corporation.

(k) The parties hereto do further herein and hereby bind and obligate themselves to sign and execute all such division orders and/or other documents and agreements that may be necessary and appropriate to enable Owners

and/or Beneficial Owners to receive directly, and without passing through Management Corporation, all rents, royalties, and other proceeds of every nature or kind whatsoever that may become due under and in all such oil, gas and mineral leases that may be hereafter executed, covering and/or bearing against the aforesaid Property, it being the intent of the parties hereto that Owners and/or Beneficial Owners, and each of them, shall have the right to receive, and shall receive, such rents, royalties and other proceeds to become due under oil, gas and other mineral leases that may be hereafter executed, in the same manner as Owners have heretofore received rents, royalties and other proceeds under presently existing leases covering and/or bearing against such Property.

7. It was similarly provided that all revenues and proceeds derived from the administration and management of the property should be credited to the account of each true owner and be paid to each true owner after deducting all proper costs and expenses, with the obligation on the part of each owner to replenish the funds for costs and expenses on a proportionate basis from time to time when needed. The right of Walter, William, and Lydia to receive the revenues and proceeds from the property or their obligation to pay the said expenses was not, in any way, dependent upon their being or remaining shareholders of Harrison Property Management Co., Inc., but such right to receive said revenues and proceeds and the obligation to pay said expenses were predicated solely upon the agreement.

8. The minutes of the first meeting of the board of directors of the corporation held on April 15, 1960, show as follows:

A meeting of the Board of Directors of the Harrison Property Management Co. Inc. was held at 507 Decatur Street, New Orleans, La. on April 15, 1960. All Directors were present, the President presided and the Secretary recorded the minutes.

Since this was the initial meeting, the President explained that in forming this Corporation nothing was really changed from the partnership, Crescent Commercial Company, which it replaced. This corporation was to be regarded as a management instrument only and all profits and losses were to be handled as though it were in fact a partnership and that it was formed solely

to provide for efficient management in the event of the death of one of the Harrisons.

It was decided to provide the Whitney National Bank with a resolution authorizing them to honor checks on the Corporations funds signed by either W. H. Harrison, President, or W. J. Harrison, Secretary-Treasurer.

There being no further business, on motion duly made and seconded, the meeting adjourned.

/s/ Lydia Harrison Couturie
Director

/s/ W. J. Harrison
Secretary-Treasurer.

/s/ W. H. Harrison
Director

Thereafter, through 1963, the minutes reflect the holding of nine meetings of the board of directors with principal reference to authorization for approval of six leases for mineral rights and several rights-of-way, and also such miscellaneous matters as approving a waiver of salaries for corporate officers, authorizing a suit to confirm title to certain land, and authorizing execution of a consent decree to extend the statute of limitations on the corporation's tax return. The minutes were duly signed by corporate officers.

9. From its original incorporation through December 31, 1963, the corporation's books and records reflect the following receipts and disbursements:

	1960	1961	1962	1963
Receipts	$83, 217. 39	$151, 916. 87	$116, 086. 27	$30, 396. 90
Disbursements	75, 014. 60	144, 327. 60	116, 723. 75	40, 335. 87

The receipts included cash contributions from shareholders, payments for leases of mineral rights and rights-of-way, proceeds from building demolition, proceeds from sale of land, camp rentals, and proceeds from sale of pecans. Payments for leases of mineral rights and rights-of-way were by far the dominant source of revenue. Disbursements included salaries for corporate officers, disbursements to shareholders, taxes, costs of litigation and professional services, supplies, travel expense, utilities, building maintenance costs, commissions, insurance premiums, land care expense, charitable contributions, petty cash, and miscellaneous. During 1960 Walter J. Harrison and William H. Harrison each received $3,200 from the corporation as wages subject to the Federal Insurance Contributions Act (F.I.C.A.).

10. The corporation handled the property transferred to it in accordance with the agreement referred to in finding 6. It held meetings of stockholders and directors to authorize action by its officers, executed leases, engaged in litigation, maintained a checking account, paid local taxes, and recorded all of its receipts and disbursements on its books and records.

11. Certain suits involving the Harrison lands, commenced prior to April 14, 1960, the date the taxpayer was formed, resulted in judgments in favor of Walter, William and Lydia. In suits commenced after April 14, 1960, the taxpayer was a party together with Walter, William and Lydia. Some of the mineral leases were executed by the taxpayer alone and some were signed by the taxpayer and Walter, William and Lydia individually.

12. The taxpayer's financial records were handled as if it were a partnership in that (a) the amounts collected by Harrison Property Management Co., Inc., from time to time, were not recorded as corporate income but were actually credited to Walter, William and Lydia, in equal proportions, (b) the expenses were likewise charged to the same three parties and (c) the corporation maintained capital accounts in the names of its said three true owners in the same manner as the partnership (Crescent Commercial Company), former manager of the property, had maintained its accounts. The corporation accounts reflected the individuals as joint owners of the properties whose legal titles they had transferred to the corporation.

13. Taxpayer maintained a checking account at the Whitney National Bank of New Orleans for the duration of the 1960–63 period.

14. For the period ending December 31, 1960, taxpayer filed a United States Fiduciary Income Tax Return, on Form 1041, showing gross income of $23,823.77, with deductions of $11,846.39, with the net income of $11,977.68 distributed on an equally proportionate basis to Walter, William and Lydia.

15. For each of the calendar years 1961, 1962 and 1963, taxpayer filed a United States Corporation Income Tax Return, on Form 1120, each said return showing no income or expenses; but each said return included a schedule showing expenses incurred under the management agreement and

that the same were paid in equal proportions by Walter, William, and Lydia.

16. For each of the calendar years 1960, 1961, 1962 and 1963, respectively, Walter J. Harrison and his wife filed United States Individual Income Tax Returns, on Form 1040, in which they reported the income and expenses allocated to them in the several above-mentioned returns that had been filed in the same calendar years by Harrison Property Management Co., Inc.

17. Similarly, William H. Harrison, and his wife, filed United States Individual Income Tax Returns for each of the calendar years 1960, 1961, 1962 and 1963, on Form 1040, in which they reported the income and expenses allocated to them in the several above-mentioned returns that had been filed in the same calendar years by Harrison Property Management Co., Inc.

18. Similarly, for each of the calendar years 1960, 1961 and 1962, respectively, Mrs. Lydia Harrison Couturie (Ryan) and her husband, Henry W. Couturie, filed United States Individual Income Tax Returns, on Form 1040, in which they reported the income and expenses allocated to them in the same calendar years by Harrison Property Management Co., Inc., and Mrs. Lydia Harrison Couturie (Ryan) filed a similar return for 1963, following her divorce from Henry W. Couturie.

19. Walter, William, and Lydia and their respective spouses, paid Federal income taxes on their respective net taxable incomes as shown by the above-mentioned returns.

20. Timely assessments of principal tax and interest were made by the Internal Revenue Service on February 9, 1968, against the taxpayer in the following amounts for the indicated years:

Tax	*Corporate Income Tax*	*F.I.C.A. Tax*	*Penalty*	*Interest*	*Total*
1960	$3,406.44			$1,398.32	$4,804.76
		$384.00	$96.00	167.33	647.33
1961	39,156.06			13,723.93	52,879.99
1962	22,604.71			6,566.41	29,171.22
1963	21,763.49			5,016.33	26,774.82
			TOTAL		$114,283.12

The total assessment was paid on an equally proportionate basis by Walter, William, and Lydia.

21. Timely claims for refund were filed on January 15, 1969, disallowed on March 28, 1969, and this suit was commenced on June 16, 1969.

22. From and after April 14, 1960, one or more portions of the Harrison lands were made subject to one or more oil, gas and mineral leases and/or rights-of-way grants, as referred to in finding 8.

(a) Each said lease and right-of-way grant was negotiated by Walter and/or William.

(b) In some instances the oil, gas and mineral leases were signed by Harrison Property Management Co., Inc., *and* Walter, William, and Lydia.

(c) In other instances such leases were signed only by Harrison Property Management Co., Inc., acting through William as its President.

(d) However, even where a mineral lease was made solely in the name of Harrison Property Management Co., Inc., as lessor, the agreed consideration therefor was (i) either received by Harrison Property Management Co., Inc., and promptly distributed to Walter, William, and Lydia, or (ii) said consideration was paid directly to said three individual parties.

(e) At times when action was necessary to protect title to or the right of possession of one or more portions of the Harrison lands, Walter, William, and Lydia joined Harrison Property Management Co., Inc., in taking formal legal action.

(f) Proceeds from the sale of the production from the Harrison lands were the subject of one or more Concursus Proceedings before the 17th Judicial District Court for the Parish of Lafourche, State of Louisiana, which were filed prior to April 14, 1960. Despite the transfer on April 14, 1960, these proceeds were directly awarded to Walter, William, and Lydia.

23. The lease dated May 15, 1964, from Harrison Property Management Co., Inc., Walter, William, and Lydia in favor of Associated Oil and Gas Exploration, Inc., was originally drawn solely in the name of Harrison Property Management Co., Inc. However, the lessee's legal counsel refused to accept a mineral lease signed *solely* by Harrison Property Manage-

ment Co., Inc., and demanded that the individual owners of the minerals should join in the execution of the said lease.

24. The handling of the expenses that accrued, from time to time, from the acts and actions of Harrison Property Management Co., Inc., in the handling and administration of the property was entirely consistent with the agreement dated April 14, 1960. Thus, Walter, William, and Lydia contributed an initial $15,000 to the corporation at the inception of its organization and the expenses were then recorded in the cash journal as they accrued and, whenever additional expense money was required, Walter, William, and Lydia were called upon to contribute and they did so contribute whatever amounts were needed, on the basis of one-third each.

25. Harrison Property Management Co., Inc., never made any loans to anyone or borrowed any funds from anyone, including particularly Walter, William, and Lydia.

26. Recovery is sought of the following amounts of income tax, FICA tax, interest and penalties:

(a) For the calendar year 1960:	
Income Tax	$3,406.44
Interest	1,398.82
FICA Tax	384.00
Penalty	96.00
Interest	167.33
(b) For the calendar year 1961:	
Income Tax	39,156.06
Interest	13,723.93
(c) For the calendar year 1962:	
Income Tax	22,604.71
Interest	6,566.51
(d) For the calendar year 1963:	
Income Tax	21,763.49
Interest	5,016.33
	$144,283.12

together with interest thereon as provided by law.

Conclusion of Law

Upon the foregoing opinion, which contains the necessary findings of fact made part of the judgment herein, the court concludes as a matter of law that plaintiff corporation is entitled to recover and judgment is entered for plaintiff corporation in the amount of $113,635.79, plus statutory interest as prescribed by law.

U.S. GOVERNMENT PRINTING OFFICE: 1974

APPENDIX B

In the United States Court of Claims

No. 280–69

(Decided March 16, 1973)

HARRISON PROPERTY MANAGEMENT CO., INC.; WALTER J. HARRISON, WILLIAM H. HARRISON AND MRS. LYDIA HARRISON COUTURIE RYAN v. THE UNITED STATES

C. Ellis Henican, attorney of record, for plaintiffs. *Henican, James & Cleveland*, of counsel.

Thomas Smidt II, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Gilbert E. Andrews, Joseph Kovner*, and *Philip R. Miller*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

OPINION

DAVIS, *Judge*, delivered the opinion of the court:*

The central issue turns on whether profits in the tax years 1960–63 derived principally from oil leases to property, the record title to which is in the name of a management corporation, are properly taxable to the corporation, as the defendant maintains or, as the plaintiffs contend, they are taxable solely to the individuals who, while retaining beneficial ownership of the property, transferred title to the corporation

*We borrow our statement of facts from the opinion of Trial Commissioner C. Murray Bernhardt but we come to the opposite conclusion on the principal question.

of which they were the sole incorporators, stockholders, officers, and directors. A subordinate issue is whether minor amounts paid by such corporation to two of its three shareholders as wages are properly classified as wages and are taxable accordingly under the Federal Insurance Contribution Act. The Government prevails on both issues.

Walter J. Harrison, William H. Harrison, and Mrs. Lydia Harrison Couturie Ryan, brothers and sister, owned extensive oil-bearing acreage and a headquarters building in Louisiana which, prior to April 14, 1960, they had operated through Crescent Commercial Company, their family partnership. On April 14, 1960, the three individuals formed the plaintiff corporation, Harrison Property Management Co., Inc., to which they transferred title to the property in question, without warranty or consideration, reserving to themselves beneficial title to the property and all rights to proceeds of existing leases thereon for mineral rights and rights-of-way. The corporation replaced the partnership, and was formed primarily for the stated purpose of providing for efficient management in the event of the death of one of the individuals. There is no hint that tax evasion or avoidance motivated the transaction.

The corporate charter tightly limited the rights, power, and authority of the corporation to conduct its business with particular reference to such transactions as acquisition of real property, investment of funds, fixing of officers' salaries, employment of personnel, adoption or repeal of by-laws, borrowing or lending of money, and sale or encumbrance of property, all of which transactions required unanimous approval of the shareholder directors. The transferors, who were the incorporators and became the sole stockholders of the corporation in equal proportions, as well as its sole officers and directors, retained full control of corporate decisions as to the matters specified. The charter required approval of a majority of the directors for the granting of leases, rights-of-way, licenses, or permits regarding the property transferred to the corporation "for administration and management purposes", and prohibited transfers of such rights so as to favor one officer or shareholder over another, directly or indirectly.

Contemporaneously with the incorporation the individuals and the corporation entered into an agreement which specified that the transfer of property to the corporation was made "solely and only as a matter of convenience and accommodation and without consideration whatsoever" having been paid by the corporation to the individuals, who were expressly identified as the "beneficial owners" and "true owners" of the property transferred, with the corporation disclaiming "any right, title, or interest" in and to the property other than the right to manage and administer it. By the agreement the corporation's expenses were to be charged against the three individuals in equal amounts by means of deductions from proceeds of operations distributable periodically to the individuals. The agreement also provided for the retransfer without consideration of any part of the corporate property to the individuals on a proportionate basis, required the corporation in the event of its breach of the agreement to retransfer all of the property proportionately to the individuals without consideration on due notice and demand by them, and required the retransfer of the property to the individuals after 50 years.

Throughout the taxable years in issue the corporation complied in all respects with the agreement's terms. It deducted from corporate revenues all expenses and credited the balance in proportionate amounts to accounts of the individuals, who received such earnings directly. The individuals were obligated to replenish the corporation's funds for costs and expenses, as needed, again on a proportionate basis. Besides payments for leases (the major source of income), receipts included cash contributions from shareholders, building demolition proceeds, profits from land sales, camp rentals, and pecan sale proceeds. Disbursements included salaries, payments to shareholders, taxes, cost of litigation and professional services, supplies, travel expenses, utilities, maintenance costs, commissions, insurance premiums, land care expense, contributions, and petty cash. The corporation maintained a checking account and recorded all receipts and disbursements on its books and records. No loans were made by or to the corporation.

The members at the first meeting of the board of directors of the corporation on April 15, 1960, specified that it was

to be regarded purely as a "management instrument only" without change from the Crescent Commercial Company partnership which it succeeded, and stated the purpose of forming the corporation to be "solely to provide for efficient management in the event of the death of one of the Harrisons."

Each of the incorporators contributed $5,000 to the authorized capital of $15,000, and received in exchange 50 of the 150 authorized and issued shares of capital stock. The corporation and the individuals joined in suits. Some leases were signed by the corporation alone and some by it and the individuals. The corporate accounts reflected the three individuals as joint owners of the properties whose nominal title had vested in the corporation. The company maintained capital accounts in the names of the three individuals and generally speaking kept its financial and accounting records in much the same way as Crescent Commercial Company, the family partnership which it succeeded.

For calendar year 1960 the corporation filed a United States Fiduciary Income Tax Return on Form 1041, showing a distribution of net income proportionately to the three individuals. In 1961, 1962 and 1963 the corporation filed returns on Form 1120, reporting no income or expenses but accompanying each return with a schedule showing the proportionate distribution of income and expenses to the three individuals. In each of the calendar years 1960 through 1963 the individual plaintiffs filed separate Federal tax returns reporting the income and expenses allocated to them by the corporation. The taxes were paid accordingly. On February 9, 1968, the Internal Revenue Service made timely assessments of taxes and interest against the corporation as shown in the findings. The assessments against the corporation were paid by the three individual plaintiffs on a proportionate basis. Claims for refund were duly filed by the corporation, and disallowed on March 28, 1969, resulting in this suit.

On the major issue of whether the management corporation is itself taxable on its income, there are well-established standards which confine and guide our ruling. The Supreme Court has spoken twice, in *Moline Properties*,

Inc. v. *Commissioner*, 319 U.S. 436 (1943), and *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422 (1949). The precedents in this court are *Carver* v. *United States*, 188 Ct. Cl. 202, 412 F. 2d 233 (1969), and *Love* v. *United States*, 119 Ct. Cl. 384, 96 F. Supp. 919 (1951). A leading case in the courts of appeals is *Tomlinson* v. *Miles*, 316 F. 2d 710 (C.A. 5), *cert. denied*, 375 U.S. 828 (1963). Under the principles declared and applied in those decisions, it is very clear that—putting aside for the moment the contract (which plaintiffs call an agreement of agency) made by the individuals with the corporation at the time it was set up—the corporation was taxable.

The paramount principle is that stockholders of a closely held corporation cannot demand (Subchapter S aside) that it be ignored for federal income tax purposes—at least if it is more than a pure sham and was created or acts for some business end. "The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity." *Moline Properties, Inc.* v. *Commissioner*, *supra*, 319 U.S. at 438–39 (footnotes omitted). Where individuals adopt the corporate form for purposes of their own, the choice of the advantages of incorporation to do business requires "the acceptance of the tax disadvantages." *Ibid.* It is immaterial that the shareholders remain the beneficial owners of the property transferred to the company, or that the latter's policies and day-to-day activities are determined, not as decisions of the corporation, but by the owners acting individually. *National Carbide Corp.* v. *Commissioner*, *supra*, 336 U.S. at 433–34; *Tomlinson* v. *Miles*, *supra*, 316 F. 2d at 714; *Carver* v. *United States*, *supra*, 188 Ct. Cl. at 212–13, 412 F. 2d at 239. By the same token, it does not matter that the corporation is regarded by its owners as a simple "dummy". *National Carbide Corp.* v. *Commissioner*, *supra*, 336 U.S. at 433; *Love* v. *United States*, *supra*, 119 Ct. Cl. at 405, 96 F. Supp. at 922.

The controlling tests, ignoring the fact that the corporation is substantially the *alter ego* of the stockholders, concentrate on the reasons why the "dummy" was created, and what it actually does.

Harrison Property Management Co. Inc. was formed for the three Harrisons' own "convenience", in that its primary purpose was to provide for efficient management if one of them died, and a lesser aim apparently was to decrease the need for the signatures of all three owners in routine operations. Those are, of course, business goals—perfectly acceptable business purposes—deliberately sought by the Harrisons for their own ease and advantage. Other benefits of the corporate form would also accrue to the shareholders, as the Fifth Circuit pointed out in the similar case of *Tomlinson* v. *Miles*, *supra*, 316 F. 2d at 713.

Moreover, this corporation was actually used, and performed business functions. It authorized and executed leases for mineral rights, granted several rights-of-way, sold some produce, acted as a party in litigation, hired executive officers, paid local taxes, maintained its building, kept a checking account, recorded its receipts and disbursements, held meetings of stockholders and directors, and followed the formalities of corporate operation. It was by no means dormant or inert. On the contrary, its business activity was fully comparable to that found in *Tomlinson* v. *Miles*, *supra*, and more than in *Carver*—both of which held the corporation a taxable entity.[1] We know of no case which, on similar facts, has disregarded the corporation, at the instance of the shareholders, as not engaging in enough business activity. In *Paymer* v. *Commissioner*, 150 F. 2d 334 (C.A. 2, 1945), the court of appeals upheld the taxability of one corporation which carried on somewhat less activity than Harrison Property

[1] There is a dispute whether the corporation had valid record title, under the peculiarities of Louisiana law, to the property transferred to it. We are not impressed with plaintiffs' state law argument that it did not—a current contention which is at war with the consistent conduct of the company's business on the understanding that it did have record title (including a statement to that effect in the side agreement between the company and its owners). Furthermore, in *Carver* v. *United States*, *supra*, 188 Ct. Cl. at 210–11, 212–13, 412 F. 2d at 238, 239, this court expressly held taxable a corporation which was assumed not to have legal or equitable title, under the intricacies of state law, to the property transferred to it by its stockholders. *See also National Carbide Corp.* v. *Commissioner*, *supra*, 336 U.S. at 434–35, 438.

Management Co., Inc., but disregarded as sham a sister company which did nothing but take and hold title to some real estate as a blind to deter the creditors of one of the shareholders.

Plaintiffs, however, do not put their major emphasis on the status of the corporation apart from the side agreement. Fundamentally, they rest on this contract between the Harrisons and the Management Company which, in their view, brings this case within the exception recognized by the Supreme Court in *National Carbide Corp.* v. *Commissioner*, *supra*, 336 U.S. at 437: "What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor." The claim is that by this pact, made contemporaneously with the birth of the corporation, the company was made, and continued to act as, such a "true corporate agent."

National Carbide makes it clear that the formal designation of "agency agreement" is not conclusive; the significant criteria, as we understand them, are whether the so-called "agent" would have made the agreement if the so-called "principals" were not its owners, and conversely whether the "principals" would have undertaken the arrangement if the "agent" were not their corporate creature. The Court put it thus: "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal * * *" (336 U.S. at 437), and the opinion illustrated that premise by saying of the corporate parent in that case (Airco, the alleged "principal"): "The entire earnings of petitioners [Airco's subsidiaries, the alleged "agents"], except for trifling amounts, are turned over to Airco not because the latter could command this income if petitioners were owned by third persons, but because it owns and thus completely dominates the subsidiaries. Airco, for sufficient reasons of its own, wished to avoid the burdens of principalship. * * * It cannot now escape the tax consequences of that choice, no matter how bona fide its motives or longstanding its arrangements. When we referred to the 'usual incidents of an agency relationship' in the *Moline Properties* case, we meant just that—not the identity of ownership and control disclosed by the facts of this case" (336 U.S. at 438–39).

An example of a "true" agency (or "true" trusteeship) under this standard was found by this court in *Carver* v. *United States*, *supra*, 188 Ct. Cl. at 213–14, 412 F. 2d at 239–40, where the wholly-owned corporation acted on behalf of a non-owner independent third-party in the same way as it did for its individual owner. The relationship to this third-party, an outsider, demonstrated that, with respect to that transaction, the company's agency connection with its owner was not dependent on the fact of ownership.

Unlike this aspect of *Carver*, we do not doubt that the present plaintiffs fail the test. It is inconceivable that Harrison Property Management Co., Inc. would have made its alleged "agency" contract with property owners other than its own shareholders, the Harrisons, or that the latter would have agreed to such an arrangement with the corporation if they did not own and control it. Obviously the agreement was deliberately drawn, in conjunction with the special provisions of the corporate charter, so that the company would service its owners alone, and was made solely because they were its owners. The entire operating arrangement was custom-made for that very purpose. The total arrangement assured, for instance, that each of the three Harrisons (or a representative) would be one of the three directors of the corporation; that sales of property would have to have the approval of all three but that two would be enough for future leases; that certain activities (including acquisition of land and making investments) would also require the unanimous consent of all three; that expenses were to be charged equally against the three; and that the property transferred to the corporation would be transferred (before the end of the corporate life in 50 years) only if all three should so demand (except in case of breach by the company or failure to manage part of the property). Thus, many of the important activities of the company required consent of all three Harrisons (or their designees), while the rest called for approval of two of them. In other words, all of the corporation's relations with the beneficial owners of the managed property were wholly dependent on the fact that they were the sole shareholders.

Several of the points made to support a "true agency" here seem to assume that the *Moline Properties-National*

Carbide-Love-Tomlinson-Carver rule for the taxability of close corporations, discussed earlier in this opinion, can be avoided by the simple device of having the company and its owners execute an "agreement" designating the former as "agent" and the latter as "principal", regardless of the actual relationships and the realistic operations of the corporation. We have already pointed out that the *National Carbide* opinion, which rejected such an agreement (comparable to the one we have before us) as establishing a "true agency", squarely disposes of that postulate, and on the contrary calls for a more substantial showing that the connection between the self-designated "principal" and "agent" is independent of the "principal's" ownership of and control over the "agent".[2]

National Carbide also answers other contentions raised on behalf of plaintiffs. One is that the "principals" (here, the Harrisons) received all the profits directly. As to this, the Supreme Court said (336 U.S. at 436):

> The Tax Court felt that the fact that Airco [the "principal" and owner in that case] was entitled to the profits by contract shows that the income "belonged to Airco" and should not, for that reason, be taxed to petitioners [the "agents", wholly-owned corporations]. Our decisions requiring that income be taxed to those who earn it, despite anticipatory agreements designed to prevent vesting of the income in the earners, foreclose this result. [Citing cases]. Of course, one of the duties of a collection agent is to transmit the money he receives to his principal according to their agreement. But the fact that petitioners were required by contract to turn over the money received by them to Airco, after deducting expenses and nominal profits, is no sure indication that they were mere collection agents. Such an agreement is entirely consistent with the corporation-

[2] Plaintiffs seem to argue that when the Supreme Court said, "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal", the Court implied that the formal existence of a bare "agency agreement" would show *ipso facto* that these relations were not, and could not be, "dependent" upon ownership (as they would be in the absence of some paper contract), but rather upon the technical wording of the agreement (regardless of its content and operation). The whole of the last section of the *National Carbide* opinion, 336 U.S. at 437–39, with its analysis of the "agency agreement" in that case, refutes this semantic suggestion.

sole stockholder relationship whether or not any agency exists, and with other relationships as well.

Another circumstance negatived by the *National Carbide* opinion as showing "true agency" is that the "agent's" assets all came from the owner-"principal", without real consideration in return. 336 U.S. at 434–35, 438. The Court thought it irrelevant on the agency issue whether the funds supplied by the owner were capital contributions or loans; in either case the parent was not a true principal. Similarly in our case the fact that the Harrisons supplied the Management Company's assets and its operating capital is ineffective to create a "true agency".

In *National Carbide* the purported "agents" (subsidiary corporations) carried on more extensive activities than Property Management did here but each of those subsidiaries was limited in its functioning (336 U.S. at 424–25), just as the Harrisons' company was restricted to the management of certain real estate. In neither instance was the "agent" permitted to perform all the functions of the "principal". And we have held in the first part of this opinion that the limited activity carried on by Harrison Property Management, which clearly resulted in income from leasing and otherwise, was enough for taxability under the *Moline Properties* principle.[3]

We close on this issue by noting that it is especially important to adhere to the *National Carbide* tests in cases, such as this, of closely-held small corporations. In Subchapter S, sections 1371–1379 of the 1954 Code, Congress has provided, in defined circumstances, for the treatment of such companies as partnerships, with the stockholders rather than the cor-

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[3] In addition, it is noteworthy that the agreement between the company and the owners does not even make clear that the conventional incidents of agency were intended to be created. For instance, it is far from plain whether the corporation purported to bind the individual Harrisons in leasing, etc.; the contract does not so state explicitly and its terms do not implicitly require that result. (Some of the leases were signed by the company alone and some by both the company and the Harrisons.) Also, the plaintiffs argue that the contract waived the individuals' limited liability, but we agree with defendant that all that was provided was that the Harrisons would be chargeable for costs and expenses before receiving distributions; nothing was said as to liability to outsiders. These and like factors are not dispositive considerations, one way or the other, but *National Carbide* suggests that they are relevant. On the whole, as our text indicates, we are satisfied that a "true agency" relationship, under the *National Carbide* standards, was not established.

poration paying the income tax on the profits. It appears highly probable that Harrison Property Management Company, though a small business corporation, could not qualify for Subchapter S benefits because more than 20 percent of its receipts in the taxable years was "passive investment income" from rents—a specific exception contained in Section 1372 (e)(5). This limitation is still an integral part of the Congressional design for lifting the tax from the corporation [4]—an existing legislative restriction which would be thwarted if non-eligible companies could attain the same result by the simple procedure of a surfacial "principal"-"agent" agreement which is not in essence divorced from the owner-corporation relationship.

On the subsidiary issue the trial commissioner wrote as follows:

"The remaining issue relates to the assessment against the corporation in 1968 of $647.33 in Federal Insurance Compensation Act taxes, penalties and interest for salaries of $3,200 each paid in 1960 by the corporation to Walter J. and William H. Harrison for services rendered by them to the corporation in that year while they were corporate officers, directors, and shareholders. The assessment was paid in equal shares by the three Harrisons. The plaintiff contends that, rather than being remuneration paid by the corporation to Walter J. and William H. Harrison for services rendered, and thus subject to FICA taxes, the sums paid were in reality extra distributions to them as partners. If so, the plaintiffs concede that the sums would be subject to the self-employment tax under section 1402 of the Internal Revenue Code, but it is not clear that such self-employment taxes were ever paid by the recipients. Since Article XV of the corporation charter authorizes the payment of ceiling salaries to the two individuals as corporate officers, which salaries were subsequently waived by formal authorization of the board of directors, and the account books of the corporation reflect that the sums received by the two individuals were paid them as salaries, it is presumed that the sums paid were salaries to corporate officers rather than distributions to partners, and

[4] Proposals have been made to remove the particular limitation, but they have not yet been adopted.

the corporation was liable to pay FICA taxes thereon. *United States* v. *Griswold*, 124 F. 2d 599 (1st Cir. 1941), cited by plaintiff is not controlling. There it was simply held that trustees in an investment trust who were not subject to shareholder control are not employees whose compensation was subject to the payment of Social Security taxes. The individuals in the case under consideration rendered services to the corporation for which the corporation was authorized to pay—and did pay—salaries. Thus, the assessment of FICA taxes, along with penalties and interest, was proper."

Plaintiffs have not excepted to this part of the trial commissioner's opinion or to his conclusion on this issue, and we adopt the quoted paragraph as our ground for rejecting this part of the claim.

The plaintiffs are not entitled to recover on any aspect of the case, and their petition is dismissed.

Findings of Fact

The court, having considered the evidence, the report of Trial Commissioner C. Murray Bernhardt, and the briefs and arguments of counsel, makes findings of fact as follow:

1. On or about April 14, 1960, and for some time prior thereto, Walter J. Harrison, William H. Harrison and Mrs. Lydia Harrison Couturie Ryan (hereafter Walter, William, and Lydia, for convenience) were the owners of approximately 22,000 acres of land (sometimes hereinafter referred to as "Harrison lands"), in the Parish of Lafourche, State of Louisiana.

2. The Harrison lands were adaptable to the trapping of fur-bearing animals and the production of oil and gas. They were not useful for any other purpose.

3. (a) On April 14, 1960, Walter, William, and Lydia transferred the Harrison lands, a building at 507 Decatur Street in the city of New Orleans that was used by the transferors as their office and for the handling of fur-bearing animals which were at one time caught on the Harrison lands, and the furniture, furnishings and equipment that were used in the operation of said office (all of said property is hereafter sometimes referred to as "the property"), to Harrison Property Management Co., Inc. by a notarial deed. The deed

granted title in fee without a warranty, but with full subrogation in and to all rights of warranty held by preceding owners and vendors. The only reservations in the deed were prior recorded rights-of-way, lease grants and servitudes, and any right, title and interest of the vendors to all existing oil, gas and mineral leases and to all rents and royalties thereunder.

(b) Immediately following the above transfer, the transaction was recorded in the journal of Harrison Property Management Co., Inc. by debiting the various asset items involved in the transfer and crediting the total aggregate value on a proportionate basis, to Walter, William, and Lydia.

4. At all times mentioned in the petition, Harrison Property Management Co., Inc. (taxpayer), was a Louisiana corporation, incorporated on April 14, 1960, following dissolution of a partnership of its stockholders, and was domiciled in the city of New Orleans. The Articles of Incorporation contained the following pertinent provisions:

ARTICLE II

The objects and purposes for which this corporation is organized are declared to be as follows:

To administer and otherwise manage the property, real, personal and mixed, of any person or persons, firm or firms, corporation or corporations, whether under a power of attorney or otherwise, and in connection therewith to hold title to some or all of said property (for administration and management purposes only); to negotiate leases relative thereto; to grant rights of way thereon or thereover; and to otherwise arrange for the use and development of such property.

To manage, supervise and administer the operation of any business or undertaking on any property subject to administration by the corporation when authorized by all of the members of the Board of Directors of this corporation.

ARTICLE III

The duration of this corporation shall be for a term of fifty (50) years.

* * * * *

ARTICLE XV

Unless authorized by the unanimous vote of all three of the members of the Board of Directors of this corporation given at a meeting of said Board of Directors duly called for such specific purposes, after notice of such meeting has been given to each director by United States registered mail at least ten (10) days prior to said meeting, the said notices to be sent to the directors at the addresses of said directors as shown in the official records of the corporation, this corporation shall have no right, power or authority whatsoever to:

1. Exercise any of the rights granted, authorized and/or permitted by R. S. 12:23, 12:24, 12:46, 12:48, 12:54 and 12:63; [Louisiana Code provisions]
2. Acquire, by purchase or otherwise, any property of any nature or kind whatsoever, other than office furniture and fixtures, marine supplies and automotive equipment, and the like, which may be required for the proper conduct of the corporation's affairs;
3. Invest any funds of the corporation in any property of any nature or kind whatsoever, whether tangible or intangible, or real, personal or mixed, other than as hereinabove authorized in the immediately preceding paragraph 2 of this Article;
4. Increase the salary or compensation to be paid to the president of this corporation over and above the sum of four hundred ($400.00) dollars per month or increase the salary or compensation to be paid to the secretary-treasurer of this corporation over and above the sum of four hundred ($400.00) dollars per month;
5. Engage in the employ of this corporation any person or persons other than the officers of this corporation and such other personnel or clerical employees as may be necessary for the proper conduct of the corporation and its affairs;
6. Make or adopt by-laws or repeal or amend any such by-laws so made and adopted in the manner herein provided;
7. Borrow or lend money; or,
8. Except as provided in ARTICLE XVI hereof, sell, transfer, dispose of, pledge, mortgage or otherwise alienate, transfer or encumber any property of any nature or kind whatsoever, title to which stands in the name of this corporation, or any right, title or interest therein or thereto.

ARTICLE XVI

When authorized by a majority of all of the directors of this corporation, this corporation may grant leases, licenses, permits or rights for mineral or trapping purposes, or otherwise, in or to, and/or grant rights of way on or over any property, title to which has been placed in this corporation for administration and management purposes, provided, however, that no such lease, license, permit or right, and/or right of way shall be granted by this corporation to or in favor of any officer, shareholder or director of this corporation, or to or in favor of any relative thereof by blood or affinity, or to or in favor of any firm or corporation in which any such officer, shareholder or director, or in which any relative or relatives of them, or of any of them, whether by blood or affinity, is or are interested, either directly or indirectly; or to or in favor of any person having any interest of any nature or kind whatsoever in the land which is the subject of such lease, license, permit or right, or right of way, and title to which said land has been placed in this corporation for management purposes only, or to or in favor of any person having any interest in any agreement made with this corporation by the owners of any property, title to which has been placed in this corporation for management purposes, or to or in favor of any relative of any such person, whether by blood or affinity, or to or in favor of any firm or corporation in which they or any of them, or in which relatives of them or any of them, whether by blood or affinity, is or are interested, either directly or indirectly, unless, in any of such events, the giving and granting of such lease, license, permit or right, and/or right of way be authorized in writing by all three of the directors of this corporation.

* * * * *

5. Other features of Harrison Property Management Co., Inc. included:

(a) Its sole incorporators were Walter, William, and Lydia;

(b) Its authorized capital was fixed at $15,000 represented by 150 shares of the Par Value $100 Per Share Common Capital Stock, divided into 50 shares of Class A Stock which went to Walter, 50 shares of Class B Stock which went to William, and 50 shares of Class C Stock which went to Lydia. Each of the individuals paid $5,000 for his stock.

(c) The three classes of Common Shares had all of the same rights and privileges, except each class elected one member of the Board;

(d) There were certain pre-emptive rights, by classes, and there were certain restrictions on the sale or other disposition of the shares;

(e) William was President, Lydia was Vice President, and Walter was Secretary-Treasurer from the inception to the date of trial; and Walter and William conducted all of the corporate affairs as authorized by the board of directors.

6. On April 14, 1960, the taxpayer corporation entered into an agreement with the three transferors, the principal provisions of which read as follows:

1. Contemporaneously with the execution of this agreement Owners have, by act passed before C. Ellis Henican, Notary Public in and for the Parish of Orleans, State of Louisiana, dated of even date herewith, transferred to Management Corporation certain property, hereinafter sometimes referred to as "Property", more fully described in said act, a certified copy of which, marked Exhibit A, is annexed hereto and made part hereof as though set forth at length herein. It is agreed by the parties hereto that such Property, so transferred by Owners to Management Corporation, shall be held, administered and disposed of by Management Corporation in the proper exercise of its corporate powers and subject to and on the terms and conditions hereinafter set forth, irrespective of any provisions or lack of provisions in the formal deed by which said Property was so transferred by Owners to Management Corporation:

(a) Transfer of the aforesaid Property by Owners to Management Corporation has been made solely and only as a matter of convenience and accommodation and without any consideration whatsoever having been paid therefor by Management Corporation to Owners and Management Corporation does herein and hereby acknowledge that it has not, in truth and in fact, any right, title or interest in and to said Property other than the right to manage and administer said Property pursuant hereto and that the record title to said Property has been transferred to Management Corporation solely and only to enable Management Corporation to so administer and manage said Property as hereinafter provided, the said Owners and the executors, administrators, heirs, legatees and assigns of said Owners, hereinafter sometimes re-

ferred to as "Beneficial Owners", being and remaining the true owners of said Property.

(b) As long as title to the aforesaid Property stands in the name of Management Corporation, said Management Corporation shall have and enjoy the right to operate, administer and manage said Property in the proper exercise of its corporate powers, as set forth and delineated in its Articles of Incorporation, including (i) the making of leases, whether for oil, gas or other minerals or for the trapping of fur bearing animals, or otherwise; (ii) the selling of shells, gravel and other similar deposits that may be found on said Property; (iii) the selling of such timber as may be located thereon; and (iv) the granting of rights of way on, over and through such Property.

(c) During the administration and management of the aforesaid Property by Management Corporation, all costs and expenses, hereinafter defined in paragraph (d) hereof, incurred or expended by Management Corporation in connection with the administration and management of said Property, shall be charged to and against the Owners and/or Beneficial Owners of the aforesaid Property in the proportions of the true ownership of the aforesaid Property by each such Owner and/or Beneficial Owner.

(d) The costs and expenses that Management Corporation shall have the right to incur and expand hereunder for the account of the Owners and/or Beneficial Owners of the aforesaid Property and to deduct from the revenues and proceeds derived from the administration and management of the aforesaid Property, and to which such Owners and/or Beneficial Owners shall be entitled, all as herein provided, shall be and consist of all expenses of Management Corporation chargeable to or incurred for the benefit of all of such Owners and/or Beneficial Owners of the aforesaid Property in the administration and management thereof, including, but without limiting the generality of the foregoing, officers' salaries, office rent, telephone and telegraph charges, office light and heat, wages of office personnel, cost of patrolling the Property and of having lines marked, cost of the making of ground and other surveys and studies, cost of any new or used materials, supplies, furniture and fixtures, and automotive and marine equipment and the like reasonably needed and used by Management Corporation in carrying out its responsibilities hereunder, as well as all overhead and administrative expenses as are applicable to the managing and adminis-

tering of the aforesaid Property, it being understood, however, that the amount of such costs and expenses to be charged against each such Owner and/or Beneficial Owner shall be proportionate to the interest of each such Owner and/or Beneficial Owner in and to the aforesaid Property.

(e) During the administration and management of the aforesaid Property by Management Corporation, and at least once each year from and after the date hereof, all revenues and proceeds derived from the administration and management of the aforesaid Property, pursuant to the provisions hereof, shall be credited to the account of each Owner and/or Beneficial Owner and shall be paid to each such Owner and/or Beneficial Owner after deducting therefrom all of the proper costs and expenses that are chargeable against each of them, all as hereinabove set forth in paragraph (d) hereof.

(f) If the management and administration of the whole or any part or portion of the aforesaid Property by Management Corporation should be discontinued at any time for any reason whatsoever then, and in any such event, any Owner and/or Beneficial Owner may demand, in writing, that Management Corporation retransfer said Property to such Owner and/or Beneficial Owner in the proportion of the then ownership of such Owner and/or Beneficial Owner in such Property, and Management Corporation binds and obligates itself to forthwith transfer such portion of said Property to said Owner and/or Beneficial Owner without consideration and by a proper and appropriate instrument of transfer similar to the form of that annexed hereto and marked Exhibit A.

Furthermore, if Owners and/or Beneficial Owners, representing in the aggregate the entire ownership of the aforesaid Property, should demand, in writing, that Management Corporation retransfer said Property to such Owners and/or Beneficial Owners, Management Corporation binds and obligates itself to forthwith transfer such Property to said Owners and/or Beneficial Owners without consideration and by a proper and appropriate instrument of transfer similar to the form of that annexed hereto and marked Exhibit A.

The obligations of Management Corporation to so transfer, as hereinabove provided, may be enforced in any legal manner available to the Owners and/or Beneficial Owners, including, but not limited to, a mandatory injunction or judgment for specific performance.

(g) It is agreed by and among the parties hereto that, in the event that Management Corporation should vio-

late any of the terms, provisions or conditions herein contained or commit any default hereunder and such violation or default shall continue for more than thirty days after written notice of such violation or default has been given to Management Corporation by United States registered mail, any one or more of the Owners or any one or more of the Beneficial Owners may demand, in writing, that Management Corporation re-transfer all of the aforesaid Property to the then Owners and/or Beneficial Owners in the proportion of their then ownership in such Property and Management Corporation shall thereupon forthwith transfer such Property by a proper and appropriate instrument of transfer similar to the form of that annexed hereto and marked Exhibit A. The obligation of Management Corporation to so transfer such Property may be enforced in any legal manner, including, but not limited to, a mandatory injunction or judgment for specific performance.

(h) In the event that a re-transfer of the aforesaid Property has not been effected under the provisions of paragraphs (f) or (g) hereof within fifty years from and after the date hereof, this agreement shall, upon the expiration of said fifty year period, ipso facto terminate and Management Corporation shall thereupon forthwith execute a proper and appropriate instrument of transfer re-transferring said Property to the Owners and/or Beneficial Owners in the manner hereinabove set forth in paragraph (g) hereof.

* * * * *

(j) As will appear from the act passed before C. Ellis Henican, Notary Public in and for the Parish of Orleans, State of Louisiana, dated of even date herewith and hereinabove referred to in paragraph 1 of this agreement, there has been excepted from the transfer contained in and by said act all right, title and interest of the Owners in and to all oil, gas and mineral leases presently covering and/or bearing against the Property described in and covered by said act of transfer, or any part or portions thereof, and all right, title and interest of the said Owners in and to the right to receive all rents and royalties due and/or to become due and payable under said leases, the said right, title and interest of said Owners in and to said leases and in and to the right to receive the rents and royalties thereunder having been by said act expressly reserved to said Owners. In order to effectuate and carry out such agreements the parties hereto herein and hereby agree and bind and obligate themselves, and each of them, to sign and execute all such division orders and/or other documents and agreements that may be nec-

essary and appropriate from time to time to enable Owners and/or Beneficial Owners to receive directly and without passing through Management Corporation all rents, royalties and other proceeds of every nature or kind whatsoever presently due or to become due to Owners and/or Beneficial Owners, and each of them, under and in all such oil, gas and mineral leases presently covering and/or bearing against the aforesaid Property, it being the intent of the parties hereto that all rights of Owners and/or Beneficial Owners, and each of them, to receive such rents, royalties and other proceeds hereafter, in the same manner as such rights to receive said rents, royalties and other proceeds have existed in Owners heretofore, shall be and remain in full force and effect and shall be unaffected in any way whatsoever by the aforesaid transfer made by Owners to Management Corporation.

(k) The parties hereto do further herein and hereby bind and obligate themselves to sign and execute all such division orders and/or other documents and agreements that may be necessary and appropriate to enable Owners and/or Beneficial Owners to receive directly, and without passing through Management Corporation, all rents, royalties, and other proceeds of every nature or kind whatsoever that may become due under and in all such oil, gas and mineral leases that may be hereafter executed, covering and/or bearing against the aforesaid Property, it being the intent of the parties hereto that Owners and/or Beneficial Owners, and each of them, shall have the right to receive, and shall receive, such rents, royalties and other proceeds to become due under oil, gas and other mineral leases that may be hereafter executed, in the same manner as Owners have heretofore received rents, royalties and other proceeds under presently existing leases covering and/or bearing against such Property.

7. It was similarly provided that all revenues and proceeds derived from the administration and management of the property should be credited to the account of Walter, William, and Lydia and be paid to each after deducting all proper costs and expenses, with the obligation on the part of each to replenish the funds for costs and expenses on a proportionate basis from time to time when needed.

8. The minutes of the first meeting of the board of directors of the corporation held on April 15, 1960, show as follows:

A meeting of the Board of Directors of the Harrison Property Management Co. Inc. was held at 507 Decatur Street, New Orleans, La. on April 15, 1960. All Directors were present, the President presided and the Secretary recorded the minutes.

Since this was the initial meeting, the President explained that in forming this Corporation nothing was really changed from the partnership, Crescent Commercial Company, which it replaced. This corporation was to be regarded as a management instrument only and all profits and losses were to be handled as though it were in fact a partnership and that it was formed solely to provide for efficient management in the event of the death of one of the Harrisons.

It was decided to provide the Whitney National Bank with a resolution authorizing them to honor checks on the Corporations funds signed by either W. H. Harrison, President, or W. J. Harrison, Secretary-Treasurer.

There being no further business, on motion duly made and seconded, the meeting adjourned.

/s/ Lydia Harrison Couturie
Director

/s/ W. J. Harrison
Secretary-Treasurer.

/s/ W. H. Harrison
Director

Thereafter, through 1963, the minutes reflect the holding of nine meetings of the board of directors with principal reference to authorization for approval of six leases for mineral rights and several rights-of-way, and also such miscellaneous matters as approving a waiver of salaries for corporate officers, authorizing a suit to confirm title to certain land, and authorizing execution of a consent decree to extend the statute of limitations on the corporation's tax return. The minutes were duly signed by corporate officers.

9. From its original incorporation through December 31, 1963, the corporation's books and records reflect the following receipts and disbursements:

	1960	1961	1962	1963
Receipts	$83,217.39	$151,916.87	$116,086.27	$30,396.90
Disbursements	75,014.60	144,327.60	116,723.75	40,335.87

The receipts included cash contributions from shareholders, payments for leases of mineral rights and rights-of-way, proceeds from building demolition, proceeds from sale of land, camp rentals, and proceeds from sale of pecans. Payments for

leases of mineral rights and rights-of-way were by far the dominant source of revenue. Disbursements included salaries for corporate officers, disbursements to shareholders, taxes, costs of litigation and professional services, supplies, travel expense, utilities, building maintenance costs, commissions, insurance premiums, land care expense, charitable contributions, petty cash, and miscellaneous. During 1960 Walter J. Harrison and William H. Harrison each received $3,900 from the corporation as wages subject to the Federal Insurance Contributions Act (F.I.C.A.).

10. The corporation handled the property transferred to it in accordance with the Articles of Incorporation and the agreement referred to in finding 6. It held meetings of stockholders and directors to authorize action by its officers, executed leases, engaged in litigation, maintained a checking account, paid local taxes, and recorded all of its receipts and disbursements on its books and records.

11. Certain suits involving the Harrison lands, commenced prior to April 14, 1960, the date the taxpayer was formed, resulted in judgments in favor of Walter, William and Lydia. In suits commenced after April 14, 1960, the taxpayer was a party together with Walter, William and Lydia. Some of the mineral leases were executed by the taxpayer alone and some were signed by the taxpayer and Walter, William and Lydia individually.

12. The taxpayer's financial records were handled as if it were a partnership in that (a) the amounts collected by Harrison Property Management Co., Inc., from time to time, were not recorded as corporate income but were actually credited to Walter, William and Lydia, in equal proportions, (b) the expenses were likewise charged to the same three parties and (c) the corporation maintained capital accounts in the names of its said three true owners in the same manner as the partnership (Crescent Commercial Company), former manager of the property, had maintained its accounts. The corporation accounts reflected the individuals as joint owners of the properties whose legal titles they had transferred to the corporation.

13. Taxpayer maintained a checking account at the Whitney National Bank of New Orleans for the duration of the 1960–63 period.

14. For the period ending December 31, 1960, taxpayer filed a United States Fiduciary Income Tax Return, on Form 1041, showing gross income of $23,823.77, with deductions of $11,846.89, with the net income of $11,977.68 distributed on an equally proportionate basis to Walter, William and Lydia.

15. For each of the calendar years 1961, 1962 and 1963, taxpayer filed a United States Corporation Income Tax Return, on Form 1120, each said return showing no income or expenses; but each said return included a schedule showing expenses incurred under the management agreement and that the same were paid in equal proportions by Walter, William, and Lydia.

16. For each of the calendar years 1960, 1961, 1962 and 1963, respectively, Walter J. Harrison and his wife filed United States Individual Income Tax Returns, on Form 1040, in which they reported the income and expenses allocated to them in the several above-mentioned returns that had been filed in the same calendar years by Harrison Property Management Co., Inc.

17. Similarly, William H. Harrison, and his wife, filed United States Individual Income Tax Returns for each of the calendar years 1960, 1961, 1962 and 1963, on Form 1040, in which they reported the income and expenses allocated to them in the several above-mentioned returns that had been filed in the same calendar years by Harrison Property Management Co., Inc.

18. Similarly, for each of the calendar years 1960, 1961 and 1962, respectively, Mrs. Lydia Harrison Couturie (Ryan) and her husband, Henry W. Couturie, filed United States Individual Income Tax Returns, on Form 1040, in which they reported the income and expenses allocated to them in the same calendar years by Harrison Property Management Co., Inc., and Mrs. Lydia Harrison Couturie (Ryan) filed a similar return for 1963, following her divorce from Henry W. Couturie.

19. Walter, William, and Lydia and their respective spouses, paid Federal income taxes on their respective net taxable incomes as shown by the above-mentioned returns.

20. Timely assessments of principal tax and interest were made by the Internal Revenue Service on February 9, 1968,

against the taxpayer in the following amounts for the indicated years:

Tax	Corporate Income Tax	F.I.C.A. Tax	Penalty	Interest	Total
1960	$3,406.44			$1,398.32	$4,804.76
		$384.00	$96.00	167.33	647.33
1961	39,156.06			13,723.93	52,879.99
1962	22,604.71			6,566.41	29,171.22
1963	21,763.49			5,016.33	26,774.82
			TOTAL		$114,283.12

The total assessment was paid on an equally proportionate basis by Walter, William, and Lydia.

21. Timely claims for refund were filed on January 15, 1969, disallowed on March 28, 1969, and this suit was commenced on June 16, 1969.

22. From and after April 14, 1960, one or more portions of the Harrison lands were made subject to one or more oil, gas and mineral leases and/or rights-of-way grants, as referred to in finding 8.

(a) Each said lease and right-of-way grant was negotiated by Walter and/or William.

(b) In some instances the oil, gas and mineral leases were signed by Harrison Property Management Co., Inc., *and* Walter, William, and Lydia.

(c) In other instances such leases were signed only by Harrison Property Management Co., Inc., acting through William as its President.

(d) However, even where a mineral lease was made solely in the name of Harrison Property Management Co., Inc., as lessor, the agreed consideration therefor was (i) either received by Harrison Property Management Co., Inc., and promptly distributed to Walter, William, and Lydia, or (ii) said consideration was paid directly to said three individual parties.

(e) At times when action was necessary to protect title to or the right of possession of one or more portions of the Harrison lands, Walter, William, and Lydia joined Harrison Property Management Co., Inc., in taking formal legal action.

(f) Proceeds from the sale of the production from the Harrison lands were the subject of one or more

Concursus Proceedings before the 17th Judicial District Court for the Parish of Lafourche, State of Louisiana, which were filed prior to April 14, 1960. Despite the transfer on April 14, 1960, these proceeds were directly awarded to Walter, William, and Lydia.

23. The lease dated May 15, 1964, from Harrison Property Management Co., Inc., Walter, William, and Lydia in favor of Associated Oil and Gas Exploration, Inc., was originally drawn solely in the name of Harrison Property Management Co., Inc. However, the lessee's legal counsel refused to accept a mineral lease signed solely by Harrison Property Management Co., Inc., and demanded that Walter, William and Lydia join in the execution of the said lease.

24. The handling of the expenses that accrued, from time to time, from the acts and actions of Harrison Property Management Co., Inc., in the handling and administration of the property was entirely consistent with the agreement dated April 14, 1960. Thus, Walter, William, and Lydia contributed an initial $15,000 to the corporation at the inception of its organization and the expenses were then recorded in the cash journal as they accrued and, whenever additional expense money was required, Walter, William, and Lydia were called upon to contribute and they did so contribute whatever amounts were needed, on the basis of one-third each.

25. Harrison Property Management Co., Inc., never made any loans to anyone or borrowed any funds from anyone, including particularly Walter, William, and Lydia.

26. Recovery is sought of the following amounts of income tax, FICA tax, interest and penalties:

(a) For the calendar year 1960:	
Income Tax	$3,406.44
Interest	1,398.32
FICA Tax	384.00
Penalty	96.00
Interest	167.33
(b) For the calendar year 1961:	
Income Tax	39,156.06
Interest	15,723.93
(c) For the calendar year 1962:	
Income Tax	22,604.71
Interest	6,566.51

(d) For the calendar year 1963:

Income Tax	21,763.49
Interest	5,016.38
	$114,283.12

together with interest thereon as provided by law.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover and the petition is dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1979

Concursus Proceedings before the 17th Judicial District Court for the Parish of Lafourche, State of Louisiana, which were filed prior to April 14, 1960. Despite the transfer on April 14, 1960, these proceeds were directly awarded to Walter, William, and Lydia.

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24. The handling of the expenses that accrued, from time to time, from the acts and actions of Harrison Property Management Co., Inc., in the handling and administration of the property was entirely consistent with the agreement dated April 14, 1960. Thus, Walter, William, and Lydia contributed an initial $15,000 to the corporation at the inception of its organization and the expenses were then recorded in the cash journal as they accrued and, whenever additional expense money was required, Walter, William, and Lydia were called upon to contribute and they did so contribute whatever amounts were needed, on the basis of one-third each.

25. Harrison Property Management Co., Inc., never made any loans to anyone or borrowed any funds from anyone, including particularly Walter, William, and Lydia.

26. Recovery is sought of the following amounts of income tax, FICA tax, interest and penalties:

(a) For the calendar year 1960:	
Income Tax	$3,406.44
Interest	1,398.32
FICA Tax	334.00
Penalty	96.00
Interest	167.33
(b) For the calendar year 1961:	
Income Tax	39,156.06
Interest	13,723.98
(c) For the calendar year 1962:	
Income Tax	22,604.71
Interest	6,566.51

(d) For the calendar year 1963:

Income Tax	21,763.49
Interest	5,016.33
	$114,283.12

together with interest thereon as provided by law.

Conclusion of Law

Upon the foregoing findings of fact, which are made part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover and the petition is dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1973

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

412-65	DALE INGRAM, INC., (formerly Florida Builders, Inc.)	
266-69 & 879-71	ESTATE OF MRS. IRENE SCOTT CHOTIN (JOSEPH SCOTT CHOTIN, TESTAMENTARY EXECUTOR)	
280-69	HARRISON PROPERTY MANAGEMENT CO., INC., ET AL.	v. THE UNITED STATES
481-69	MATHER CONSTRUCTION COMPANY, ET AL.	
183-70	UNITED STATES FIDELITY & GUARANTY CO., ET AL.	
175-71	MARION A. SANCHEZ	

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges.

ORDER

These cases come before the court on motions for rehearing, reconsideration, new trial, to alter and amend a judgment, for relief from judgment, for clarification, for modification, for leave to file a request for reconsideration and rehearing after expiration of time and for further relief under Rules 151 and 152 of the Rules of this court and, on consideration thereof,

IT IS ORDERED that said motions be and the same are denied as follows:

412-65 Dale Ingram Inc., (formerly Florida Builders, Inc.) Plaintiff's motion to amend a judgment and for other relief and defendant's motion to alter and amend final judgment pursuant to Rule 151(c).

266-69 & 879-71 Estate of Mrs. Irene Scott Chotin, etc. Plaintiff's motion for new trial and rehearing.

280-69 Harrison Property Management Co., Inc., et al. Plaintiff's motion for new trial and rehearing.

481-69 Mather Construction Company, et al. Plaintiffs' motion for leave to file request for reconsideration and rehearing after expiration of time.

183-70 United States Fidelity & Guaranty Co., et al. Plaintiff's motion for relief from judgment and for rehearing and new trial.

175-71 Marion A. Sanchez. Defendant's motion for clarification, modification, and reconsideration of court's opinion of April 16, 1973.

BY THE COURT

JUL 13 1973

Chief Judge

CERTIFICATE OF SERVICE

I, C. ELLIS HENICAN, attorney for petitioners in the foregoing application for writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I have served copies of the foregoing application for writ on:

Hon. Erwin N. Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530

and

Hon. Scott P. Crampton
Assistant Attorney General
Attention: Mr. Thomas Smidt, II
Department of Justice
Tax Division
Washington, D. C. 20530

by mailing copies thereof, Air Mail, postage prepaid, addressed to their respective offices, on this 5th day of October, 1973.

All parties required to be served have been served.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

C. ELLIS HENICAN

SUPREME COURT, U. S.

No. 73-618

FILED
NOV 29 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

HARRISON PROPERTY MANAGEMENT CO., INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-618

HARRISON PROPERTY MANAGEMENT CO., INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. On April 14, 1960, petitioners Walter J. Harrison, William H. Harrison and Lydia Harrison Couturie Ryan, dissolved a partnership and formed petitioner Harrison Property Management Co., Inc. ("Management"), a corporation to hold and manage 22,000 acres of land in Louisiana (the "Harrison Lands") for the development of income. The tract was adaptable to the trapping of fur-bearing animals and the production of oil and gas. The individual petitioners were the sole stockholders of Management. They transferred the Harrison Lands to Management on the date of its incorporation in fee without a warranty, but with full subrogation in and to all rights of warranty held by preceding owners and vendors (Pet. App. B 49-53).

Management opened a bank account and maintained books and records showing its receipts and disbursements.

In addition, it paid local taxes and instituted and defended suits involving the lands owned by it. During the years in suit (1960-1963), it held ten meetings of its board of directors and the minutes reflect authorization by the board for approval of six leases for mineral rights and several rights-of-way, which were all negotiated by the corporate officers. The board also approved a waiver of salaries for corporate officers, authorized a suit to confirm title to certain land, and authorized execution of a consent decree to extend the statute of limitations on the corporation's tax returns (Pet. App. B 57-59).

Contemporaneously with the incorporation, petitioners and Management entered into an agreement which recited that the transfer of property to the corporation was made "solely and only as a matter of convenience and accommodation and without consideration whatsoever" having been paid by Management, which disclaimed "any right, title, or interest" in and to the property other than the right to manage and administer it. Under the agreement, Management's expenses were to be charged against the three petitioner-shareholders in equal amounts by means of deductions from the proceeds of operations which were distributed periodically to the shareholders (Pet. App. B 40, 53-57).

For the period ending December 31, 1960, Management filed a fiduciary income tax return, showing its net income distributed on an equally proportionate basis to the three petitioner-shareholders. For each of the calendar years 1961, 1962 and 1963, Management filed corporate income tax returns, which reported no income or expenses but included schedules which showed all expenses paid by the shareholders reported on their individual income tax returns and showed the income and expenses allocated to them on the returns filed by Management (Pet. App. B 60).

On audit, the Commissioner of Internal Revenue determined deficiencies against Management on the ground that it was a taxable entity reponsible for reporting income from lands belonging to and managed by it. In a refund suit in the Court of Claims, the Trial Commissioner upheld the claimed refund (Pet. App. A 14-37). The Court of Claims, however, agreed that Management was a taxable entity and dismissed the petition (Pet. App. B 38-63).

2. In concluding that the income from the Harrison Lands was taxable to Management and not to its shareholders, the Court of Claims correctly followed the decisions of this Court in *Moline Properties* v. *Commissioner,* 319 U.S. 436 and *National Carbide Corp.* v. *Commissioner,* 336 U.S. 422. Those cases established the rule that a corporate entity cannot be ignored for federal income tax purposes as long as it is formed for business purposes or engages in business activity. Here, Management performed numerous functions in its own name which were more than sufficient to constitute business activity under *Moline Properties.*[1]

Urging that the status of Management was that of an agent, petitioners assert (Pet. 7-9) a conflict with

---

[1] The Court of Claims stated (Pet. App. B 43), that the corporation—

> authorized and executed leases for mineral rights, granted several rights-of-way, sold some produce, acted as a party in litigation, hired executive officers, paid local taxes, maintained its building, kept a checking account, recorded its receipts and disbursements, held meetings of stockholders and directors, and followed the formalities of corporate operation. It was by no means dormant or inert. * * * We know of no case which, on similar facts, has disregarded the corporation, at the instance of the shareholders, as not engaging in enough business activity. * * *

National Carbide Corp. v. *Commissioner, supra.* They rely upon the statement in that case that "What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor." (336 U.S. at 437). But petitioners cannot avoid the impact of the Court's further statement (*ibid.*) that "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent."

Management, however, could not be characterized as carrying on the normal duties of an agent. As the Court of Claims found (Pet. App. B 45), Management was created solely to serve the beneficial owners of the property, who continued to control every aspect of its activities. It served no one else. Cf. *Carver* v. *United States,* 412 F. 2d 233 (Ct. Cl.). As a result, Management's relations with the beneficial owners were wholly dependent on the fact that they were its sole shareholders and did not involve their capacity as principals.[2] Under the standards of *National Carbide,* Management was not a "true agent" and must therefore be treated as a taxable entity required to report the income from its property.

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[2] Petitioners argue (Pet. 9-11) that the Court of Claims placed undue emphasis upon the fact that the beneficial owners of the property were the shareholders of Management. In their view, the recitations in the corporate charter that Management was organized to manage the property of "any person or persons * * *" should control. But, as the Court of Claims correctly stated (Pet. App. B 43, 46), the controlling tests to be applied here do not depend upon such semantic descriptions used by the parties to characterize their activities, but instead depend upon "the reasons why the 'dummy' was created, and what it actually does."

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

SUPREME COURT, U. S.

FILED

DEC 7 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-618

HARRISON PROPERTY MANAGEMENT CO., INC., WALTER J. HARRISON, WILLIAM H. HARRISON and MRS. LYDIA HARRISON COUTURIE RYAN,

Petitioners

versus

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY FOR PETITIONERS

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New Orleans, La. 70139

COUNSEL FOR PETITIONERS

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-618

HARRISON PROPERTY MANAGEMENT CO., INC., WALTER J. HARRISON, WILLIAM H. HARRISON and MRS. LYDIA HARRISON COUTURIE RYAN,

Petitioners

versus

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY FOR PETITIONERS

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The respondent in its memorandum in opposition to the petition for writ of certiorari misstates the issue in this case. The question is not whether the corporation, Harrison Property Management Co., Inc., (a) is a taxable entity or (b) is engaged in business activity, but rather whether the corporation, Harrison Property Management Co., Inc., could have been the agent for its owners-principals, pursuant to a clear and unambiguous

agency agreement entered into simultaneously with the transfer of record title to it of the owners' property. Said property produced the income in question and the said transfer would not have been made except for the simultaneous execution of the agency agreement between the corporation and the three individual owners of the property. Moreover, the transfer was made without any consideration whatsoever.

The Commissioner of Internal Revenue erroneously determined that the income from the property so transferred belonged to the corporation, contrary to the intention of the parties as shown by the clear and unambiguous provisions of the agency agreement between the owners of the property and the corporation, which held record title solely for the purpose of management, pursuant to the agreement. The Trial Commissioner of the United States Court of Claims gave full effect to all three documents executed by the individuals, namely, (i) the corporate charter, (ii) the transfer of record title of the property to the corporation, and (iii) the simultaneously executed agency agreement between the individual owners of the property and the corporation. In failing to follow the Trial Commissioner's recommendations, the United States Court of Claims erroneously concluded that the corporation was taxable on income which it had received as agent for its owners-principals.

Respondent's memorandum states that the Court of Claims correctly followed the decisions of this Court in Moline Properties v. Commissioner, 319 U.S. 436 (1943) and National Carbide Corporation

v. Commissioner, 336 U.S. 422 (1949), in that those cases "established the rule that a corporate entity cannot be ignored for federal income tax purposes", (Mem., p. 3), and that the corporation performed functions "which were more than sufficient to constitute business activity under Moline Properties." (Mem., p. 3). As pointed out in the petition for writ of certiorari, the agency argument failed in the Moline case because an agency agreement had not been established, whereas in this case it is clear that the parties entered into an agency agreement for the sole purpose of providing management for the property in question by the corporation. At all times,the income from the property was treated on the books of the corporation as belonging to the individual owners in the proportion of a one-third (1/3) each, and the income was not recorded as earned by the corporation. The expenses incurred, in connection with the management of the property, were recorded as liabilities of, and were charged to, the three individuals, also in equal proportions. The corporate books showed that the property, itself, was owned by the three individuals in equal proportions, not by the corporation. The testimony taken at the trial of the case (Transcript, p. 58-69) describes the books and records of the corporation from which it was overwhelmingly established that the corporation, at all times, held the property merely as agent for the three individuals. See Joint Exhibit 58.

There can be no doubt that the activities of the corporation were those

normally carried on by an agent, i.e., the collection of rents and distribution thereof to the principals, the payment of expenses and the charging of said expenses to the principals, the execution of leases on behalf of the principals, granting of rights-of-way, all of which activities the agent was expected to carry on as specifically provided in the agreement between the principals and the agent. Moreover, the limitations placed upon the agent with respect to alienation of the property were consistent with the principal-agency relationship. The corporation, Harrison Property Management Co., Inc., is not to be regarded as a "dummy" corporation but must be recognized as an entity which acted as agent for its principals. The National Carbide case does not require that the true corporate agent which is managing property for its owner-principal be also engaged in the management of property of others in order to be controlled by the rule that the income of the principal is not taxable to the agent. Nevertheless, it is clear that the corporate charter in this case, did, in fact, give Harrison Property Management Co., Inc., the authority to hold title to property belonging to persons other than its shareholders and to manage such property. The corporation was free to enter into any type of management contract with such owners of property as might be mutually satisfactory. The ministerial nature of the corporation's activities was reviewed by the Trial Commissioner to show that, unlike the corporate agent in the case of National Carbide Corporation v. Commissioner, supra, the corporation,

Harrison Property Management Co., Inc., was not engaged in any business of its own. (Pet. App. A 20).

By treating the deed which transferred record title to the property to the corporation as unrelated to the contemporaneously executed agency agreement, the respondent has fragmented what was intended to be a unity transaction. That is,the transfer of the property would not have taken place without the execution of the agreement between the corporation and the individual owners of the property. It is submitted that the respondent cannot arbitrarily select one of the steps in a unified select one of the steps in a unified transaction and accord that step independent significance. Thus the corporation would not have had any property in its name except upon the condition that the corporation would act solely as agent for the individuals (and not as owner), all as set out in the agreement entered into between the individuals and the corporation. The agency relationship therefore is not dependent upon the fact that the corporation is owned by the principals, but rather the agency relationship is established by the agreement and the Articles of Incorporation. (Joint Exhibits 1 and 6, Pet. App. A 27-32, 12-14).

CONCLUSION

No provisions of the Internal Revenue Code, Treasury Regulations, or decisions in any cases require the disregard of the agency relationship between Harrison Property Management Co., Inc., and the three individuals, which the Trial Commissioner found to exist. (Pet. App. A 20, 22, 23). Holding record title to the property did not make the corporation the owner of the property for tax or any other purposes, in view of the conditions under which the corporation had acquired such record title. Therefore, the income in question was not income from the corporation's property but was income which the corporation received solely as agent for the account of its principals-owners. For the reasons set out above, as well as those stated in the petition for writ of certiorari, petitioners pray that the petition for writ of certiorari be granted.

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CERTIFICATE OF SERVICE

I, C. ELLIS HENICAN, attorney for petitioners, in the application for writ of certiorari and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I have served copies of the foregoing Reply for Petitioners on:

Hon. Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

and

Hon. Scott P. Crampton
Assistant Attorney General
Attention: Mr. Thomas Smidt, II
Department of Justice
Tax Division
Washington, D. C. 20530

by mailing copies thereof, Air Mail, postage prepaid, addressed to their respective offices, this day of December, 1973.

All parties required to be served have been served.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

C. ELLIS HENICAN

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-618

HARRISON PROPERTY MANAGEMENT CO., INC., WALTER J. HARRISON, WILLIAM H. HARRISON AND MRS. LYDIA HARRISON COUTURIE RYAN,

Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully pray that the Court reconsider its Order denying their petition for a writ of certiorari to review the judgment of the United States Court of Claims in the above entitled cause, entered by this Court on January 7, 1974, and grant the petition.

As grounds for this petition,

petitioners respectfully request the Court's consideration of the following:

I. The decision of the United States Court of Claims violates the due process clause of the Fifth Amendment to the Constitution of the United States:

As was stated in Nichols v. Coolidge, 274 U.S. 531, 542 (1927):

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment." (Citations Omitted).

If a statute can be declared in violation of the Fifth Amendment, certainly the confiscatory application of taxing statutes in this case offends the due process clause of the Fifth Amendment to the Constitution of the United States.

The decision of the United States Court of Claims likewise violates the rulings of this Court in Hoeper v. Tax Commission, 284 U.S. 206, 215, 218 (1931), wherein the Court said:

> "That which is not in fact the taxpayer's income cannot be made such by calling it income."
>
> * * * * *
>
> "The exaction is arbitrary and is a denial of due process."

The income belonging to the individual petitioners herein, reported by them on their individual income tax returns, and

subjected to income tax at individual rates cannot be made the income of the corporation by calling it corporate income. Subjecting the individual income to corporate income tax under these circumstances is arbitrary and a denial of due process.

II. The decision of the United States Court of Claims is in conflict with decisions of the Courts of Appeals for the Fifth Circuit, the District of Columbia Circuit, the Eighth Circuit and the Fourth Circuit:

A. In the case of McInerney v. Commissioner of Internal Revenue, 82 F.2d 665 (5th Cir. 1936), a corporation was created for the purpose of passing title to the purchaser of property and passing payment to the petitioner. The Court held that payment to the corporation was constructively received by the petitioner.

However, in this case the United States Court of Claims has held that receipts of a corporation created to receive income belonging to its owners is taxable to the corporation.

B. The Court in 112 West 59th Street Corporation v. Helvering, 68 F.2d 397, 398 (D. C. Cir. Ct. 1933), stated:

> ". . . the entire beneficial interest in the property was in the trust . . . petitioner was a mere 'conduit' and . . . it never at any time had any legal right to retain the profits from the transaction in question. . .

> then it would seem to follow that the liability to pay the tax under the federal income tax laws was solely a liability of the trust and not a liability of petitioner. And this is particularly true when we consider that the former duly reported and paid the tax and no question of bad faith in the organization of petitioner or in its participation in the transaction is or can be attributed to it."

Here too, the corporation never at any time had any legal right to retain the profits which the United States Court of Claims has taxed to it; nor is there any question of bad faith in the organization of the corporation or tax avoidance motives. (Pet. 39).

Moreover, in the 112 West 59th Street Corporation case, the Court went on to say:

> "It may well be that at the time of the transaction there was no specific or formal agreement that petitioner should hold the property for the benefit of the trust, but the absence of such agreement or the lack of formality does not alter the obvious intent of the arrangement. No court would in the circumstances we have named permit it to retain the property or the profits in fraud of the real owner."

In the instant case, a carefully drawn

agreement established the rights of the owners to the income from the property and no court would permit the corporation to retain the property or the profits in fraud of the real owners. Despite this principle of law, the United States Court of Claims has required the corporation to pay income tax on revenues it received for the benefit of others and which it had no legal right to retain!

C. The Eighth Circuit has said:

"A cardinal purpose of the income tax laws is to tax income to the person who has the right or beneficial interest therein, and not to throw the burden upon a mere conduit through whom or which the income passes." (Citations Omitted) Central Life Assur. Soc. Mut. v. Commissioner of Internal Revenue, 51 F.2d 939, 941 (8th Cir. 1931).

The Court concluded:

"The undisputed fact is that the petitioner bound itself to pay to designated persons 'any earnings there may be for a period of twenty-two years from the date hereof, from the non-participating business hereby and hereunder transferred,' and that a method of determining those earnings, which is apparently fair and sincere and workable, is set forth in the contract. . .These earnings never became the absolute property of petitioner, and it could lawfully do with them but

> one thing, which was to pay them over in accordance with the contract. It secured no beneficial interest whatsoever from them."

In the instant case, the earnings in question never became the property of the corporation, and it, too, could lawfully do but one thing with those earnings, that is, pay them over to the owners of the property in accordance with its contract with the said owners.

D. In the case of United States v. Brager Building & Land Corporation, 124 F.2d 349, 351, 352 (4th Cir. 1941), a corporation was organized to provide an agency to take property over from a partnership, and to hold title in order to avoid complications in case of the death of the surviving member of the partnership. The Court stated:

> ". . . it is going too far to say that if a taxpayer forms a corporation for his convenience, he is thereafter estopped from disclosing the true nature of the arrangement, whenever it is of advantage to the government to recognize only the corporate form. . . it has been held that when a corporation has been formed merely as an agency to hold title to real estate for the convenience of the owner, and has served this purpose with little or no independent activity on its part, the property and the income therefrom should be regarded as belonging to the stockholder." (Citations Omitted).

The Court then concluded as to the corporation:

> "It was a convenient agency chosen by the owners to hold the record title of their property, and nothing more. It performed no other function, it engaged in no other activity, and was at all times completely subject to the dominion and control of the Brager partnership. The income from the property was in our opinion income of the partnership."

The corporation in this case is likewise a convenient agency chosen by the owners to hold record title to their property. The income from the property should be treated as the income of the stockholders and not the income of the corporation.

III. The decision of the United States Court of Claims results in unjust and oppressive consequences contrary to the principle announced by this Court in Farmers Loan & T. Co. v. Minnesota, 280 U.S. 204 (1929), and is beyond its judicial power:

In the case of Buhl v. Kavanagh, 118 F.2d 315, 323 (6th Cir. 1941), it was held that a transaction may not be broken up into various elements to create a tax, and that where the taxpayer had no control over the income in question, to tax all of the income to her would be unjust. Here, too, taxing all of the revenues from property to the corporation that does not

have any right to the income is unjust and oppressive.

Moreover, the United States Court of Claims in its ruling has in effect legislated that under the Internal Revenue Code a corporation may not be an agent of its stockholders. The well recognized principle of corporate law is to the contrary:

> "A corporation may be an agent for its shareholders, and individuals may be both stockholders and contractors with the corporation as an agent." 2 Mertens Law of Federal Income Tax, §17.11 p. 65.

This amendment to the Internal Revenue Code by the United States Court of Claims is beyond judicial power, as well as unjust and oppressive. See, Heiner v. Donnan, 285 U.S. 312 (1931).

CONCLUSION

For the reasons set forth in the Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

CERTIFICATE OF COUNSEL

I, C. ELLIS HENICAN, counsel for the above named petitioners do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

C. ELLIS HENICAN

CERTIFICATE OF SERVICE

I, C. ELLIS HENICAN, attorney for petitioners in the foregoing petition for rehearing, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I have served copies of the foregoing petition for rehearing on:

Hon. Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

and

Hon. Scott P. Crampton
Assistant Attorney General
Attention: Mr. Thomas Smidt, II
Department of Justice
Tax Division
Washington, D. C. 20530

by mailing copies thereof, Air Mail, postage prepaid, addressed to their respective offices, on this 30th day of January, 1974.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

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